United States Court of Appeals

for the Second Circuit

APPENDIX

74-1713

B P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-1713

In the Matter of

A Motion to Compel Arbitration

between

INTEROCEAN SHIPPING COMPANY,

Petitioner-Appellee,

-and-

NATIONAL SHIPPING AND TRADING CORPORATION and
HELLENIC INTERNATIONAL SHIPPING, S.A.,

Respondents-Appellants

JOINT APPENDIX
PART 2

TRIAL TRANSCRIPT

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PAGINATION AS IN ORIGINAL COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S.D.C. Filed May 14, 1973 S.D.N.Y.

INTEROCEAN SHIPPING CO.,

Petitioner,

vs.

NATIONAL SHIPPING & TRADING CORP. and HELLENIC INTERNATIONAL SHIPPING, S.A.,

Respondents.

CONSENT ORDER
71 CIV. 336

FILE COPY
HAIGHT, GARDNER, POOR & HAVENS
ONE STATE STREET PLAZA NEW YORK
5/15/73
ENTERED
RE

Recd 5/15/73 P&P

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the respective parties hereto that the correction to the trial transcript as set forth in the annexed lists are agreed to be proper, and an order deeming the trial transcript so corrected may be entered.

Dated: New York, N. Y., May 14, 1973.

S/ Haight Gardner Poor & Havens
HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Petitioner

Hill Betts & Nash
HILL, BETTS & NASH
Attorneys for Respondent

SO ORDERED:

New York, N. Y.,
May 14, 1973

Sylvester J. Ryan
U. S. D. J.

LKR:BR:5:5/17/73:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

INTEROCEAN SHIPPING CO.,

Petitioner,

vs.

NATIONAL SHIPPING & TRADING CORP., and HELLENIC INTERNATIONAL SHIPPING, S.A.,

Respondents.

- x

PETITIONER'S PROPOSED CORRECTIONS TO TRANSCRIPT

Page 2, line 23	substitute "about" for out.
Page 2, line 24	insert word "the" between 1971 and broker.
~~Page 3, line 11~~	~~substitute "a fixture" for interest.~~
Page 8, line 9	delete word "day" after 23rd.
Page 12, line 19	substitute word "offer" for order.
Page 19, line 7	substitute "fourty five" for "four or five."
Page 23, line 16	substitute "ton" for money.
Page 27, line 20	substitute "cable" for Table.
Page 35, line 24	substitute "and" for the second by.
Page 58, line 17	insert word "club" after P & I.
Page 58, lines 23-25	should read: THE WITNESS: The London Steamship Mutual Club, The United Kingdom Club is about your largest and the West of England Club could be involved.
Page 59, line 3	substitute "who" for to.
Page 77, lines 23-24	substitute "OBOs" for oboe.

Page 78, line 5	substitute "OBO" for oboe.
Page 122, line 19	"17th" should be substituted for 7th.
Page 306, line 13	substitute "wing" for wind.
Page 335, line 14	substitute "from" for "for."

Respectfully submitted,

HAIGHT, GARDNER, POOR & HAVENS

Attorney for Petitioners

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

INTEROCEAN SHIPPING CO.,

Petitioner,

vs.

NATIONAL SHIPPING & TRADING CORP., and
HELLENIC INTERNATIONAL SHIPPING, S.A.,

Respondents.

- X

RESPONDENTS PROPOSED
CORRECTIONS TO TRANSCRIPT

Page 2, line 3	should read Judge Timbers
Page 26, line 2	should read Mobil time
Page 60, line 4	"seized" for "ceased"
Page 61, line 10	"bank" for "banker"
Page 67, line 18	"the" for "it"
Page 73, line 21	"equate" for "relate"
Page 75, lines 18 & 21	"Calmar" for "Kalmar"
Page 83, line 12	should read "that this is the correct"
Page 88, line 10	"two weeks" for "six weeks"
Page 89, line 9	"an estimate" for "a statement"
Page 100, line 14	delete "penned"
Page 102, line 10	should read "ship, insurance, valuation."
Page 105, line 23	should read "such as"
Page 111, line 11	delete "to"
Page 113, lines 4-6	should read - And you say "By that time - - this is not in my notes. This is recollection. He had not been familiar with Mobil time but had previously looked at it."

Page 114; line 2	insert "be" after would
line 12	second "in" should read "on"
Page 117, line 3	period close quote following petties
line 5	delete quotation marks
Page 119, line 4	"confirmed" for "concerned"
Page 121, line 17	"Poten" for "Proten"
Page 122, line 7	insert "of" after draft
Page 128, line 2	"been" for "to be"
Page 141, line 11	"that" for "tha"
Page 142, line 14	"got" for "get"
Page 144, line 4	should read - You put all this at the time - memorialized
Page 147, line 13	insert "at" after else
Page 151, line 2	"shows" for "chose"
Page 165, line 13	"Grand Bassa" for "Grand Bassett"
Page 176, line 14	"18th" for "18"
Page 182, line 7	"expression" for "impression"
Page 185, line 24	"there" for "and"
Page 200, line 24	"Ras Tanura" for "Rastaniers"
Page 212 (MCS 7) line 24	delete "tampering"
Page 220 (MCS 15) line 12	"back" for "bck"
Page 224 (MCS 19) line 16	"topic" for "top"
Page 226 (MCS 21) line 13	"higher ups" for "highers up"
Page 229 (MCS 24) line 16	"23rd" for "2rd"
Page 237, line 9	"Poles" for "Pules"
Page 240, line 24	"ever" for "every"
Page 245, line 20	"unusual" for "usual"
Page 254, line 25	"vessel" for "vesse"
Page 259, line 12	"VLCC" for "ULCC"
line 19	"USNH" for "US and H"
Page 266, line 19	delete "two"
Page 272, line 7	"doubts" for "duties"
Page 290, line 3	"Plimsoll" for "plimpsol"

Page 312, line 7	insert "much" after how
Page 313, line 19	"language" for "llnaguage"
Page 318, line 20	"stamp" for "staff"
Page 320, line 16	"the" for "he"
Page 324, line 14	"as" for "sa"
Page 326, line 24	"voyages" for "budges"
Page 327, line 25	"hire" for "higher"
Page 330, line 23	"either" for "eith-r"
Page 339, line 21	"Gorrissen" for "Borrissen"

Respectfully submitted,
HILL, BETTS & NASH

Attorneys for Respondents

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

INTEROCEAN SHIPPING CO.,

Petitioner,

vs. : 71 Civ. 3363

NATIONAL SHIPPING & TRADING CORP., and HELLENIC INTERNATIONAL SHIPPING, S.A.,

Respondents.

----------x

Before

HON. SYLVESTER J. RYAN,

District Judge.

New York, N.Y.
April 25, 1972 - 10 a.m.

APPEARANCES:

HAIGHT GARDNER POOR & HAVENS, ESQS.
Attorneys for Petitioner,
By James M. Estabrook, Esq., and
Lennard K. Rambusch, Esq., of Counsel

HILL BETTS & NASH, ESQS.
Attorneys for Respondents.,
By David Gilchrist, Esq., and
Mark Jaffe, Esq., of Counsel.

THE COURT: This is a non-jury case. This is a case that came back from Judge Timbers for trial on a special issue.

MR. ESTABROOK: That is right, your Honor.

THE COURT: All right, I suppose you want to make a brief opening statement.

MR. ESTABROOK: If I may, your Honor.

THE COURT: All right. Take your time. I will first hear from you and then from Mr. Gilchrist, I take it.

MR. GILCHRIST: Yes, your Honor.

THE COURT: We will hear from Mr. Estabrook first and then from you, Mr. Gilchrist.

MR. ESTABROOK: May it please the Court: This is a summary trial on a petition to compel arbitration in connection with the chartering of the ship Oswego Reliance, a combination oil and ore carrier of about 50,000 tons dead weight. The ship was to be chartered for a period of one year, - days more or less, delivery between 31 March and 15 April, 1971, Persian Gulf; redelivery Persian Gulf. The charter rate was to be $5.60 per ton a month.

The chartering arrangement came about in this manner: On March 17, 1971 the broker, Poten & Partners, received an inquiry from National as to whether they had any

ready ships available. Poten then got in touch with the Petitioner and called Tony Germano who works for Steamship Services, another Bethlehem Steel subsidiary, and who handles the chartering for Interocean, the Petitioner, it being a wholly-owned subsidiary of Bethlehem Steel.

After some discussions as to whether the Oswego Reliance was or was not available, the ship was eventually available, a prior offer to another charterer having expired without a fixture.

There then were discussions by telephone by Poten's Frank DeSalvo, who will testify here, giving certain offers from the Respondent and certain counter-offers from the owners and finally late in the afternoon of March 17 a charter was agreed upon.

At that point, Poten, acting for both parties, sent confirmatory Telex messages, one to the Petitioner and one to the Respondents. Now, these messages are placed in our briefs and they are similar except for the provision as to brokerage. Brokerage, being by custom of the trade always for owner's account, consequently the provisions for brokerage was in the Interocean Telex only. THere was no letters, it being the custom of the trade that the Telex messages are treated as letters, and

we are seeking arbitration on behalf of Interocean against both Hellenic International Shipping, S.A. and National on the grounds that Poten was acting as their agent in sending for the Telex and the Telex on March 17 confirms the agreement.

Now, these Telex messages set forth the substantial points of the charter:

"Owner: Interocean Shipping Co.

"Charterer: Hellenic International Shipping, S.A., of Panama, subsidiary of National Shipping & Trading with appropriate letter of guarantee."

Then it names the ship, Oswego Reliance.

THE COURT: The guarantee was by Hellenic?

MR. ESTABROOK: Hellenic was to be the charterer.

THE COURT: National was the guarantor?

Are they related, those two companies, in any way?

MR. ESTABROOK: We understand Hellenic is a subsidiary of National.

THE COURT: Yes.

MR. ESTABROOK: Then there are the measurements of the vessel: "49,283 dead weight. 39 feet 5/8 inches draft. Cubic 98 per cent 1,968,842 cubic feet. 3 pumps. 1300 tons per hour each, 16.5 knots and 100 Bunker C

per day.Delivery/redelivery PG" -- Persian Gulf -- "Excluding FAO and ABADAN."

Those are two ports in Iran.

"LAYCAN" -- in other words, the lay dates and the cancelling date -- March 31/April 15, 1971."

The ship had to be delivered between that period.

"ETA" -- estimated time of arrival -- "April 1, 1971.

"Crude and/or DPP" -- DPP means dirty petroleum products -- "maximum three grades within natural segregations; maintaining heating 135 degrees Fahrenheit; coiled wing tanks only; trading worldwide"--

THE COURT: DPP means unrefined crude oil?

MR. ESTABROOK: And/or dirty petroleum products. That means not gasoline, not kerosene but crude or maybe ~~is it~~ number 6 bunker C fuel, something like that, heavy oil.

THE COURT: Heavy oil?

MR. ESTABROOK: Yes.

"Trading worldwide within the International World Limits excluding Communist-controlled China, North Vietnam, North Korea, Cuba.

"Period one year plus or minus 30 days;

"Mobil time charter excluding clauses 9,

12AII, 12BII, 12BIII;

"Suitable drydock clause to be worked out for November drydocking;

"About 15 days with proper notices; performance review every six months; overtime and petties $750 per month; rate $5.60 per dead weight per month payable US dollars in New York.

"Thank you for the opportunity to conclude this business."

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The Telex message sent to the owners is the same except for the commission of one and one-quarter per cent payable to Poten & Partners Incorporated and one and one-quarter per cent payable to Steamship Service. Steamship Service could be considered the house brokers for Bethlehem Steel. They are another wholly-owned subsidiary of Bethlehem Steel.

There was no correction or reply to this Telex message received from either the owners or their charterers until the charterer was purportedly cancelled by the charterers on the 24 of March.

It is our position that this exchange of Telexes on the 17th of March consitutes the contract.

There were discussions between the parties as to matters additional to the contract which were resolved in

this fashion:

There was an inquiry as to whether or not the vessel was entered in TOVALOP, Tanker Owners Voluntary Agreement as to Liability for Oil Pollution. This ship was a combination ore and oil carrier. She had not been a member of TOVALOP earlier. TOVALOP was in no way referred to in the contract but if the charterers indicated an interest in having this vessel in TOVALOP they could put it in here.

Bethlehem Steel did enter the vessel in TOVALOP and she was so entered on March 23. In addition other vessels of the fleet were also entered.

THE COURT: That covers payments to National Governments for oil pollution. I am familiar with it.

MR. ESTABROOK: Yes.

THE COURT: I am familiar with it. I had the Ocean Eagle case.

MR. ESTABROOK: Oh, yes.

There was a questionof delivery and redelivery in the Red Sea that was agreed to. Owners said that they didn't mind that. There was a question of trading in Communist countries which owners could not agree to primarily because this was a Taiwan crew and they couldn't have the crew go into Communist countries.

There was a discussion of the drydocking clause but the drydocking clause was something that would have to be worked out probably later in October or November when you could find out just where the ship was trading. There was a clause prepared by owner. Charterers suggested another clause. There was no refusal to accept one clause or another and in fact on the 23rd before the cancelling, the charterers did telephone a proposed clause to the effect that they would do their best to have the ship in position so she could be drydocked in Portugal, Spain or Japan.

I don't recall the exact words, but in any event, this was never reported to the owner since it was delivered to Poten in the late afternoon of the 23rd of March.

On the 24th of March the broker got a call and was asked whether he had given the proposed drydocking clause to owners.

He said "not yet," and was told "do not do it."

Then on the 24 of March for the first time the Telex was received from the charterers stating that they refused to go ahead with the charter party.

It is our position that the Telexes on the 17th were clear. They were set forth by the broker representing

both parties and not having been corrected, there being no question as to the Telexes reflecting the minds of the people on the 17th of March, the fixture was made on the 17 and we are entitled to arbitration pursuant to the terms of the agreement.

THE COURT: Yes, Mr. Gilchrist.

MR. GILCHRIST: Your Honor, the Court of Appeals said in ruling on whether we were entitled to this hearing that the question presented was whether there had been a meeting of the minds as to all the essential terms of the charter party on March 17. I have to take issue with nearly everything that Mr. Estabrook said. We are dealing, as he says, with one broker purporting to act for both parties to the negotiations.

THE COURT: That is not an unusual situation, is it?

MR. GILCHRIST: It happens.

THE COURT: Frequently, doesn't it?

MR. GILCHRIST: It is not uncommon. Many times both sides have their own broker, but it is perfectly normal for one broker to act for both.

THE COURT: Nothing sinister in it. By that I mean, it is a custom of the trade.

MR. GILCHRIST: Nothing sinister about that.

However, Mr. Estabrookwants you to believe that by dealing through this broker my clients made him their agent. That is sheer nonsense, as the evidence will bring out.

He also states that there was no refusal or correction to what I say, your Honor, is the wholly self-serving so-called fixture letter sent by this broker. He was corrected verbally. It is not necessary to send Telexes back and forth within the City of New York when you have got a common broker working negotiations.

Our position, your Honor, is very simply that this situation, despite the so-called fixture letter, never got beyond the stage of negotiations, never ever, and I am surprised to hear Mr. Estabrook at this late stage of the game continuing to maintain that Hellenic is the subsidiary of National. That is not the case.

There is a second issue presented by these hearings because on Mr. Estabrook's theory both Hellenic and National are supposed to be parties to this alleged charter party and we deny that either of them ever entered into a binding charter party.

But, in any event, if National was supposed to have a role then the alleged role is as some sort of guarantor and we deny that any guarantee was ever given.

Your Honor, I think you are going to have to judge

this case on the evidence as it comes out in the documents and in the testimony of the witnesses.

THE COURT: All right, call your first witness.

MR. ESTABROOK: Yes. Mr. DeSalvo, please.

MR. GILCHRIST: May I ask one request, your Honor?

THE COURT: Yes.

MR. GILCHRIST: I don't know how fast Mr. Estabrook's case is going to move today, but we have one witness, Mr. Porvancher, who must fly to London tomorrow morning and I would like to ask leave now to put him on out of order, if that is the way it works out, about 3 o'clock this afternoon.

3/ THE COURT: We will proceed. We will see that he testifies today. We will put him on before that.

MR. GILCHRIST: All right, your Honor.

THE COURT: Who is ordering the minutes?

MR. ESTABROOK: I will order them.

MR. GILCHRIST: We will go half.

THE COURT: It will be taxable to the successful party, I so direct a taxable disbursement because I am ordering them.

MR. ESTABROOK: Thank you, your Honor.

THE COURT: All right.

F R A N C I S D E S A L V O , called as a witness in behalf of the Petitioner, after having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ESTABROOK:

Q Mr. DeSalvo, what is your present position?

A Presently I am chief executive officer of Poten & Partners.

Q Is that a ship brokerage firm?

A Yes, it is.

Q How long have you been engaged in the ship brokerage business?

A Approximately four years.

THE COURT: Tell us just what the ship brokerage business is.

THE WITNESS: Well, you act as a broker between the principals, the charterer and the owner to help put the deal together. You get an offer from one, the charterer of the ship and the other is the owner and you act as the go-between on the negotiations and help pull it together.

Q Has this been in connection with the brokerage of oil tankers?

A Yes.

Q Is it customary in the brokerage trade in New York to have one broker in oil tankerage contracts?

A Yes.

MR. GILCHRIST: I object to the form of the question. I don't think counsel has to lead.

THE COURT: It is leading, but we all know it to be a fact, don't we?

It is common knowledge with those familiar to the admiralty field.

MR. GILCHRIST: There is sometimes more than one version of what custom is, your Honor.

THE COURT: Why don't you ask him? He does not object to the question being leading. He objects to the wording of it.

Is it frequently done, ask him, instead of customary. He doesn't like the word "customary."

Does a ship brokerage firm frequently act for both parties, the charterer as well as the owner?

THE WITNESS: Yes, sir.

THE COURT: All right. That has been so in the New York area, in the New York market?

THE WITNESS: Yes, sir. True in other markets, too.

Q Do you recall a vessel known as the Oswego Reliance?

A Yes.

Q By the way, do you have notes that you keep in connection with your business?

A Right.

Q Have you brought your notes with you?

A Yes.

THE COURT: What do you mean by notes, diary notes, diary entries?

THE WITNESS: Yes, I write down -- not in a diary book but on a piece of paper when negotiations are transpiring to keep a record.

THE COURT: Do you keep that record as a regular part of your business, a business record?

THE WITNESS: Yes.

THE COURT: Do you have those records here?

THE WITNESS: Yes, sir, I do.

THE COURT: Do you want to have them marked for identification at this time?

MR. ESTABROOK: Yes, I think that is a good idea. Thank you, your Honor.

Will you mark these two pages as Petitioner's Exhibit 1, please, for identification?

THE COURT: Put in parenthesis "plaintiff". Apparently we should now call them plaintiff's petitioner.

Call it Plaintiff Petitioner's 1.

xxx (Plaintiff Petitioner's Exhibit 1 marked for identification.)

MR. GILCHRIST: May I see them, counsel?

THE COURT: I would prefer to have the witness testify from his recollection, if he can.

MR. ESTABROOK: Yes.

THE COURT: Maybe counsel would consent to these papers being received in evidence. I don't know. It may save some time, if he does.

Was a deposition taken of this witness?

MR. GILCHRIST: Let me speak to that, your Honor.

MR. ESTABROOK: No, the deposition was not taken.

THE COURT: No deposition was taken.

MR. GILCHRIST: Counsel, if I understand correctly, on the house staff of Bethlehem Steel came early in April to Mr. DeSalvo and took what he chose to call a statement that was taken under oath and it takes the form of an exparte deposition.

Now, on that occasion in April of 1971 there was marked as being Mr. DeSalvo's contemporaneous notes the first page of these two which have been marked now for identification there was no mention made of this second page, none whatever as to their being two pages of

contemporaneous notes.

THE COURT: I think at this point, then, you'd better just proceed and you may use any statement that your house counsel took of Mr. DeSalvo as a basis for cross examination when you reach that stage.

MR. GILCHRIST: Yes, sir.

Q Is it also true, as Mr. Gilchrist stated --

THE COURT: Is this a question now?

MR. ESTABROOK: Yes.

THE COURT: Don't refer to Mr. Gilchrist. He was talking to the Court, not to the witness. Go ahead. Have him relate what he did himself and he may refresh his recollection by looking at any paper he wants to.

MR. ESTABROOK: Yes.

THE COURT: It is noted upon the record that the witness has before him Plaintiff Petitioner's Exhibit 1 for identification and that he is referring to it as he is testifying.

Q Mr. DeSalvo, when did you first discuss the Oswego Reliance?

A With this particular charterer?

Q Yes.

A At lunch on the day of March 17, I believe, with Mr. Theodoracopulos.

THE COURT: March 17 of what year?

THE WITNESS: 1971.

Q What is the first name of Mr. Theodoracopulos?

A Harry.

Q Where was the lunch; do you remember?

A I don't remember the name of the restaurant. It is an Italian restaurant up on Central Park near Columbus Circle.

Q What did you say to Mr. Theodoracopulos and what did he say to you?

A I couldn't remember the exact words, but we discussed the market in general at that time and what was the outlook for the future.

THE COURT: Future of the market or what?

THE WITNESS: The future of the market.

THE COURT: Of what market?

THE WITNESS: The tanker market.

THE COURT: Of the hiring and chartering of tankers?

THE WITNESS: That is correct.

THE COURT: Are these large tankers, converted Liberties, short tankers or what were they?

THE WITNESS: Anywhere from, say, 20,000-ton size on up to larger sizes then which maybe was 250,000. We

discussed what vessels were available for charter for different periods, what rates various owners were asking.

Q At that time were you authorized by owners to offer the Oswego Reliance?

A No, I was not.

MR. GILCHRIST: You are directing your questions now to the luncheon?

MR. ESTABROOK: That is right, the luncheon.

THE COURT: To the time when he talked with Theodoracopulos on March 17,1 971. He says at that time he had not approached the owners yet.

Q Did Mr. Theodoracopulos make you any definite offer or did he just --

A No, he did not.

Q After lunch did you investigate further the possibility of chartering the Oswego Reliance?

A Yes, I did.

Q What did you do?

A I'm not sure which order came first, but I believe I asked Mr. Germano, the owner's representative, if the vessel was still available and he was still talking in the same rate levels that he had been in the morning. I then talked to Mr. Theodoracopulos and told him the vessel was still available, did he have interest.

Q What did he say then?

A He said "Yes, bring an offer in."

Q Then what didyou do after that?

A Called Mr. Germano to get a firm offer on the vessel.

Q Did you get one?

A Not immediately. I guess I'd have to look back, but it was about forty-five minutes or an hour later that the ship became free from other business he was working and then he gave us an offer.

Q And you recall what the offer was?

A I would have to refer to the notes. I don't recall the exact rate.

The original offer, according to my notes, was $5.75.

THE COURT: Who gave you that figure?

THE WITNESS: Mr. Germano.

THE COURT: Of the owner company, the plaintiff?

THE WITNESS: The owner company, Bethlehem, to me, Bethlehem Steel.

THE COURT: Interocean Shipping?

THE WITNESS: Yes.

THE COURT: What was that price he gave you?

THE WITNESS: $5.75.

THE COURT: What is $5.75?

THE WITNESS: He would pay $5.75 for each deadweight

ton per month of the vessel.

THE COURT: It was a registered vessel and you knew its tonnage?

THE WITNESS: He gave me all the terms of the vessel, which was basically not too different from the final 49,283 deadweight.

Q Who did Mr. Theodoracopulos represent himself as representing at this time?

MR. GILCHRIST: I object to the form of the question, your Honor.

THE COURT: Overruled.

THE WITNESS: May I answer that?

THE COURT: Yes.

A I don't believe he told me any particular representation at this time. I knew who the gentleman was.

Q Did you know who the charterer was to be?

A I did not know the style of the charterer on the first offer.

Q Did Bethlehem Steel indicate who the charterer should be?

A They asked me who it was to be. I told them to my knowledge it was represented by National Shipping and Trading. They said they would have to check with their

people about who the charterer was and see what necessary arrangements or guarantees could be given.

THE COURT: Had you prior to the date of March 17th of 1971 closed any prior charter with National?

THE WITNESS: Yes, sir.

THE COURT: Had you negotiated any prior charter with National through Mr. Harry Theodoracopulos?

THE WITNESS: Yes, sir.

THE COURT: Did you know when you closed that prior charter what office or connection he had with that company?

THE WITNESS: No, not exactly. I wouldn't know his official title in the company.

THE COURT: Had he acted for them in the prior negotiations and prior charters?

THE WITNESS: Yes, sir.

THE COURT: How long before this March 17th date that you are telling us about was this prior charter?

THE WITNESS: Approximately two years prior to that date. I have been in the brokerage business throughout all that time.

THE COURT: How many prior charters were there?

THE WITNESS: This would be just recollection, but I would say four or five.

mcbr 5 De Salvo-direct

THE COURT: Proceed, Mr. Estabrook.

Q Did the name of Hellenic appear during this first negotiation?

THE COURT:Was it mentioned?

Q Was it mentioned?

A No.

Q What was the form of the charter to be; was that discussed?

A Yes, it was offered on Mobil time.

THE COURT: What is Mobil time?

THE WITNESS: It is a form of charter party put out by Mobil Oil Corporation. Most of the major oil companies have their own for one reason or another, but this one both principals were familiar with so this was the one used.

THE COURT: What form of charter had you used in your prior dealings with National?

THE WITNESS: Well, they weren't -- all the prior dealings weren't on the time charter basis which this form is. Some were single voyage or consecutive voyage, which is a different form, as I recall, the one previously that we had done since I had been there on time charter was on Mobil time.

Q You got these things from Mr. Germano; is that

correct?

A That is correct.

Q Did you give these figures to somebody then?

A Yes,I gave the firm offer to Mr. Theodoracopulos.

Q Did Mr. Theodoracopulos reply to that?

A Yes, he gave me a counter offer.

Q This was by telephone, was it?

A That is correct.

Q What was the counter offer?

A Do you want me to go through all the terms, your Honor?

THE COURT: I don't want you to do anything but answer the question that you were asked.

A Okay. The counteroffer on hire was $5.50 per ton. It was stated that Hellenic International Shipping S.A. of Panama would be the charterer.

THE COURT: Who made this counter offer?

THE WITNESS: Mr. Theodoracopulos.

THE COURT: How did you contact him?

THE WITNESS: On the telephone.

THE COURT: Where did you get him on the phone?

THE WITNESS: At his office in New York.

THE COURT: Tell us, if you remember, when you did that, what date?

mcbr 7 De Salvo-direct

THE WITNESS: Approximately 4 o'clock on the 17th of March 1971.

THE COURT: What was said on that telephone conversation you had with Theodoracopulos?

THE WITNESS: I related to him the full offer as follows:

The Oswego Reliance, and ore-oil carrier, 49,283 deadweight, 39 feet 5/8 inch draft, 16.5 knots on 100 tons Bunker C per day, cubic capacity of 1,968,842 cubic feet at 98 per cent.

"Crude/or maximum three grades within natural segregations; maintain heat 135; coiled wing tanks only; delivery one safe port Persian Gulf excluding FAO and Abadan at charterer's option. Redlivery one safe Persian Gulf at owner's option."

MR. GILCHRIST: I think we can stipulate that --

THE COURT: It would be better if he gave us his testimony, please.

MR. GILCHRIST: He is simply reading, your Honor.

THE COURT: I don't know what he is refreshing his recollection from.

MR. GILCHRIST: He is reading word for word from this exhibit.

THE COURT: It has not been offered, has it?

MR. GILCHRIST: It has been marked for identification.

THE COURT: Yes. That is not an exhibit you objected to. If you want to let that in evidence he can then summarize it from that exhibit.

MR. ESTABROOK: I would like the witness to go ahead.

THE COURT: There is no concession that it may be received in evidence. Go ahead and tell us what you said to this man when you spoke to him on the telephone.

A Lay days were March 31st to April 15, 1971; ETA April 1st, trading worldwide within IWL, and that is Institute Warranties Limits excluding China.

THE COURT: What do you mean by "Institute"?

THE WITNESS: It is an insurance --

THE COURT: A Lloyds institute?

THE WITNESS: There is an American institute warranties limits and foreign but it is trading within or without insurance in the various areas at different times of the year, excluding China, North Vietnam, North Korea, Cuba, Israel and all other communist countries. Overtime and petties $750 per month, rate $5.75 per dead-weight ton per month. Suitable drydock clause scheduled for November, 15 days one year, plus or minus 15 days.

Model time sub details.

That was the offer given to Mr. Theodoracopulos. His counter offer was as follows:

What was the pumping capacity of the ships? Review the performance every six months.

He accepted the offer with these alterations:

One year plus or minus 30 days. Overtime and petties $500. Rate $5.50 per deadweight per month. Mobil time excluding clauses 9, 12AII, 12BII, and 12BIII.

What were the last two cargoes? And the suitable drydock clause was to be worked out with sufficient advance notice. The charterer was to be Hellenic International Shipping S.A.of Panama.

Q Was Hellenic International Shipping S.A. of Panama identified?

A As a subsidiary of National Shipping.

Q Who told you that?

A Mr. Theodoracopulos.

Q What did you do then after you got this counter proposal?

A I passed this proposal to Mr. Germano on the phone.

Q What did he reply?

THE COURT: When?

THE WITNESS: These offers and counter proposals were for reply of 4:55 p.m. March 17, 1971. I don't know the exact moment in which I got the counterproposal from each party, but it ranged from between 4 to 4:30 as the conversations went back and forth.

Q What did Mr. Germano tell you?

A He gave me the pumping capacity of the ship as being three pumps, 1300 tons water per hour each at 100 PSI. He told me the last two cargoes were dirty petroleum products. Otherwise he agreed to the counter-offer with these alterations: Overtime and petties, $750 per month. Charter hire $5.65 per deadweight per month.

THE COURT: What do you mean overtime and petties $750 per month?

THE WITNESS: It is customary that the owner get paid some extra money for the crew overtime victualling, cable expense and such rather than leave this an open term, as the charters had been done years ago, by most people who negotiate a figure in the negotiations today.

Q What did you do after this telephone conversation with Mr. Germano?

THE COURT: What did Germano say about this

offer?

THE WITNESS: He gave me a counter offer of $5.65.

THE COURT: When that happened --

THE WITNESS: I called Mr. Theodoracopulos and gave him the counter offer.

Q What did he say?

A He gave back at $600 for overtime and petties and $5.55 for charter hire.

Q What did you do then?

A Passed that to Mr. Germano on the phone.

Q What did Germano do ?

A He came back at $5.60 for the charter hire, $750 for the overtime and petties.

Q What did you do then?

A Passed that to Mr. Theodoracopulos and he accepted that proposal.

THE COURT: What did he say?

THE WITNESS: I wouldn't know the exact phrase. But we usually say "You are confirmed."

THE COURT: If I understand it, then in your conversations back and forth between Theodoracopulos and this man representing the owner you disclosed to each what parties were interested in the transaction?

THE WITNESS: That is correct.

THE COURT: And you gave them the names?

THE WITNESS: That is correct.

THE COURT: And you never put them in direct contact with one another?

THE WITNESS: No.

THE COURT: And they didn't ask to be put in contact one with the other?

THE WITNESS: No, they did not.

6/ THE COURT: Were you the negotiator acting for both of them then by telephone?

THE WITNESS: I wouldn't say I was the negotiator. I passed their negotiations back and forth.

THE COURT: You were the broker?

THE WITNESS: The broker.

THE COURT: All right. How are you paid?

THE WITNESS: The owner pays a percentage of the charter hire as commission.

THE COURT: Is that usual in the market?

THE WITNESS: Yes, sir.

THE COURT: Is that set by any agreement?

THE WITNESS: No, it is sort of customary to be 1-1/4 per cent, 1-1/4 per cent of all monies paid under the charter party of the charter hire paid.

Q Did you discuss the relationship between National Shipping and Trading and Hellenic?

A Yes. Mr. Germano wanted some -- Bethlehem wanted some guarantee who Hellenic Shipping & Trading was.

Q Did you point this out to Mr. Theodoracopulos?

A Yes, I did.

Q What did he say?

A He said appropriate guarantees could be given.

Q By the way, when was this last telephone conversation with Mr. Theodoracopulos?

A I'd say about 4:45.

Q Of what date?

A On March 17.

Q What did you do then?

A I typed up at our office, had our office type up the two Telexes which went out to both parties confirming the negotiations.

Q I show you two papers and ask if you recognize them?

A Yes, sir, those are copies of Telexes we sent.

THE COURT: What is this Telex? Just state it for the record so we know.

THE WITNESS: It is basically what Mr. Estabrook referred to in his opening.

THE COURT: What is it?

THE WITNESS: It just outlines --

THE COURT: It is a machine, is it?

THE WITNESS: Yes, sir.

THE COURT: Can you typewrite your message like a cable on the typewriter?

THE WITNESS: You type it and it goes directly

to the receiving party's machine in their office.

THE COURT: They have their receiving machine in their office?

THE WITNESS: That is correct.

THE COURT: And it is immediately transmitted?

THE WITNESS: That is correct.

THE COURT: So you set out what you call a confirmation, did you?

THE WITNESS: Yes.

THE COURT: By Telex addressed to --

THE WITNESS: You get an answer back from each.

THE COURT: You send it out addressed to whom?

THE WITNESS: Mr. Theodoracopulos for National Shipping and for Mr. Tony Germano at Bethlehem Steel.

THE COURT: Are those the copies of the Telexes?

THE WITNESS: Yes, they are.

MR. ESTABROOK: I would like to offer them in evidence.

THE COURT: Mark the one addressed to National as Plaintiff Petitioner's Exhibit 2 for identification.

MR. ESTABROOK: Yes.

THE COURT: And the other one addressed to Bethlehem will be Plaintiff Petitioner's Exhibit 3.

Do you offer them in evidence?

MR. ESTABROOK: Yes.

THE COURT: Any objection?

MR. GILCHRIST: I would just like to ascertain what the originations of these two copies were; whose offices they came from and whose Telexes.

THE COURT: He said they came from him.

THE WITNESS: They came from our office.

THE COURT: From Poten?

THE WITNESS: That is correct.

MR. GILCHRIST: That is a Xerox, isn't it?

THE WITNESS: That is correct, a Xerox copy of our original Telexes.

Q Do you have the original with you?

A I don't know if I have the originals. I have one of them, but I don't know if I have the other one.

MR. GILCHRIST: May I compare, your Honor?

THE COURT: Yes.

Suppose we take them at this point in evidence subject to comparison. If you find a variance you can use that for cross examination of this witness.

MR. GILCHRIST: All right.

xxx (Plaintiff Petitioner's Exhibits 2 and 3 received in evidence.)

THE COURT: Subject to verification by Mr. Gilchrist.

Did you get any response by Telex?

THE WITNESS: No, sir. You get the answer back on the machine from each company and --

THE COURT: Did you get it?

THE WITNESS: No. You get an answer back on the machine at the bottom knowing that they received it. There was no verbiage back.

THE COURT: So that is on your machine it comes back that the message was delivered; is that correct?

THE WITNESS: That is correct.

THE COURT: To the party by Telex to whom you had addressed it?

THE WITNESS: That is correct.

THE COURT: But you didn't get any message back directly from those people saying "confirmed" or "accepted"?

THE WITNESS: No. That had already been done on the phone.

THE COURT: On the phone?

THE WITNESS: This was just --

THE COURT: Is this the usual way of having confirmation?

THE WITNESS: We always do it. I don't know if everybody does it, but on a time charter we always put it on the Telex so there is no question if one party

thinks they said something the other one didn't think they said.

THE COURT: All right.

Did you receive any protest from them when you sent this out?

THE WITNESS: No, I did not.

THE COURT: By return Telex?

THE WITNESS: No.

THE COURT: That they rejected the terms or that the terms were not as they had agreed?

THE WITNESS: No, sir.

Q I show you a paper and ask if this bears your signature?

MR. ESTABROOK: Could I have the original?

A Yes, it does.

Q What is this paper?

A It is a statement taken(in our office) -- I really don't know the exact date -- but shortly after --

THE COURT: What date is on there? Tell us.

THE WITNESS: 6 of April, 1971.

Q Who took the statement?

A Taken by Mr. Joe Kelley and a shorthand reporter and Notary Public of the State of New York.

Q This was signed by you?

A Yes, it was.

Q When was it signed by you?

A The 14 day of May, 1971.

MR. ESTABROOK: I ask that this be marked for identification.

xxxx (Plaintiff Petitioner's Exhibit 4 marked for identification.)

Q What happened in relation to the Oswego Reliance after that?

A Well, we started to work on the terms of the charter that had not been completely agreed. The drydocking clause -- we started to make up the working copy of the charter party.

MR. GILCHRIST: Who is "we"?

THE WITNESS: Poten & Partners.

Q Did you have any further discussions with either Mr. Theodoracopulos or Mr. Germano?

A Yes. I don't believe so on the day of the 17th. We started on the 18 to draw up the working copies of the charter party, get the necessary further details for that to be sent to both parties.

Q Did Poten & Partners do any further work in connection with the vessel?

A I wouldn't recall the exact -- I don't recall the exact date, but, yes, we offered the ship out on a single voyage charter.

Q Who suggested or authorized that?

A Mr. Theodoracopulos.

Q Were you able to fix the ship on a single voyage?

A No, sir.

7/ Q Was there any discussion as to other terms of the charter party?

THE COURT: When did he say to offer it on a voyage charter?

THE WITNESS: I don't recall the exact date, whether it was the Friday or the Monday.

THE COURT: How soon after the 17 was it?

THE WITNESS: I think the 17 was a Wednesday. It was either Friday the 19th or Monday would be the 22.

THE COURT: How did you receive this authorization to offer it for a voyage charter?

THE WITNESS: By telephone.

THE COURT: What did he say, if anything, on the phone at that time.

THE WITNESS: Chevron, Standard Oil Company of California was open for a similar size vessel in the Persian

Gulf.

THE COURT: Who said this?

THE WITNESS: They put out an order to brokers.

THE COURT: You say that you offered it on a voyage charter?

THE WITNESS: Yes.

THE COURT: And you did that after you had sent out this Telex which you say had been accepted by National or by Hellenic?

THE WITNESS: Yes, sir.

THE COURT: You say that you received this authorization on the Friday?

THE WITNESS: I don't remember whether it was a Friday or Monday.

We had an order that was telephoned to us from Standard of California, also to many other brokers. One of the principals that we called was Mr. Theodoracopulos asking him if he wanted to offer this vessel on this piece of business and he said yes, he would. What rate he offered me, I don't recall the exact rate, but I believe it was world scale 160, which is a form of -- world scale is a book that is put out listing base rates between various ports.

THE COURT: Where was this voyage to be from?

THE WITNESS: They asked for several options but, as I recall, it was to be Persian Gulf to South Africa.

THE COURT: That was within the terms of your Telexed charter, was it?

THE WITNESS: Yes.

THE COURT: And Theodoracopulos told you that you could offer it?

THE WITNESS: That is correct.

THE COURT: For one voyage?

THE WITNESS: That is correct.

Q What happened? What did you do? Did you offer it?

A Well, we called up the charter people in Standard Oil of California -- I don't recall which particular individual it was at that time -- and told them we could offer them this ship, the size and description and would they want the offer, and they asked for more details of the ship, which we gave them, but they would not accept the offer unless the vessel was entered in TOVALOP.

Q What is TOVALOP?

THE COURT: He has already told us. That is the sea pollution agreement.

THE WITNESS: Yes, protecting the ship against any

assessment for oil pollution to the shoreline.

THE COURT: Payable to the national governments?

THE WITNESS: That is correct.

THE COURT: As distinguished from local owners.

Q Had TOVALOP been mentioned earlier in the chartering arrangements?

A No, sir.

Q And in 1971 could you say whether there was any custom for TOVALOP Membership for oil tankers?

A Just about this time was the transitionary period where major oil companies were starting to require it. Some owners belonged and some did not.

THE COURT: Was it after the Torrey Canyon?

THE WITNESS: Yes.

Q In 1971 was there any custom as to who would pay for TOVALOP fees?

A It was a negotiated item.

Q What did you do after you heard from Standard Oil of California?

A I told Mr. Theodoracopulos they wouldn't accept an offer unless the vessel was entered in TOVALOP. He asked me to find out if the vessel was.

Q What did you do then?

A I called Mr. Germano and I asked him and he

said no, it was not; that it had been under consideration but that Bethlehem Steel was self-insured and had not done anything about TOVALOP.

Q What did you reply to that?

A I told him that I thought they were going to have to; that more and more companies were demanding that and I thought that in this instance that it would be extremely difficult for Mr. Theodoracopulos to offer the ship in contract, anything that was not under TOVALOP.

Q Was that your personal opinion?

A Yes, it was.

Q What did Mr. Germano say?

A He said they would take it up in general with their insurance people and management and get back to me.

Q What happened next?

A It was several days before they were able to get -- I think two days before they had management's approval to go ahead with their whole fleet into TOVALOP and then, of course, it had to be the actual registry of the vessels in TOVALOP, which took another day or so before it was done. I told Mr. Theodoracopulos at that time that the vessel was going to be entered into TOVALOP, and Mr. Germano said that the cost should be for charterer's account. Mr. Theodoracopulos didn't agree with that.

Q Were there any other items discussed?

A We were continuing to discuss the wording of the drydocking clause.

Q What was the purpose of the drydocking clause? Give us the background?

A Formerly in the charter form there was a clause that the vessel is drydocked prior to delivery. It is fairly customary these days that it is not. However, some stipulation then has to be changed. Usually in a short-term charter like this a vessel will not drydock during a 12-month charter. However, in this case it was discussed during the negotiations to be in November for 15 days and we had to work out the necessary wording and notice to be given, proper wording to the clause.

Q Do you have an opinion as to whether the drydocking clause is a major or essential part of the charter?

THE COURT: I don't think that is competent at this time or relevant here.

MR. ESTABROOK: Thank you.

THE COURT: I think Judge Timbers made comment on this in his opinion. I think there is some writing here on it. However, go ahead. I will let it be answered so we will have a complete record.

This is an inspection generally taken either after some disaster or stranding or grounding or a hull inspection for purposes of insurance, isn't it?

THE WITNESS: No, sir, usually once a year, every 18 months or two years, depending on the individual owners, the ship is drydocked for normal overhaul, bottom painting.

THE COURT: Hull inpsection too?

THE WITNESS: That is correct.

THE COURT: It is required by the insurance underwriters, isn't that right?

THE WITNESS: That is right.

THE COURT: I think we can almost take this as being a matter of common knowledge in the maritime field.

THE WITNESS: Yes, sir, every ship drydocks.

Q What considerations enter into the selection of a drydocking port?

A I am sure from the owner's standpoint he wants to go where the cost is low and he can get the job done in the speediest time and so on. Positioning of the vessel is one thing where we would want -- I don't think it pertains in this case, but there are times where there is a guarantee. There are certain guarantees where you have to go back where the ship was built.

Q Does it depend on the trade that the vessel was in at the time?

A Yes.

Q When a vessel is drydocked who is paying for the vessel?

A The vessel is off hire at that time. It is for the owner's account.

Q And if the vessel has to proceed to another port who pays for the vessel while she is steaming to the drydock port?

A The deviation time is paid by the owner.

Q The deviation time is what?

A If it was going from the Persian Gulf to Rotterdam, thatamount of mileage back from Rotterdam back to the Persian Gulf for the next loading is taken as normal. If the ship then has to -- and takes additional time to go into the Mediterranean for drydocking, that additional time is for the owner's account.

Q What happened then?

A Well, we had gone back and forth two or three times on the TOVALOP.

As to who is going to pay for this insurance, neither side altering their position. We had gone back and forth on the drydocking clause wording with suggestions from the owners and counter suggestions from the charterers with changes being made. We had made up a pro forma working copy of the chater party to send to both parties to look at. Then, I believe it was on Tuesday the 23rd -- I would have to check the exact date, but I believe it was Tuesday, the 23rd of March that I received a Telex from Mr. Spears saying that negotiations had been suspended.

THE COURT: Who is Mr. Spears?

THE WITNESS: He works with Mr. Theodoracopulos.

THE COURT: What does he do there?

THE WITNESS: Well, I don't really know as I am qualified to say that. I don't know. I know he has worked with Mr. Theodoracopulos for many years.

THE COURT: What time was it that you got this message?

THE WITNESS: The negotiations had been going on with Mr. Theodoracopulos.

THE COURT: Let me finish my question.

When was it that Spears contacted you about this?

THE WITNESS: Tuesday morning.

THE COURT: What day?

THE WITNESS: I believe it was the 23 of March. I would have to check.

THE COURT: March 23, 1971?

THE WITNESS: Yes, sir.

THE COURT: How did he contact you?

THE WITNESS: By telephone.

THE COURT: Is his office here in New York?

THE WITNESS: Yes, sir.

THE COURT: What did he say to you in substance

and what did you say to him?

THE WITNESS: At that time he asked me if the drydocking clause that he had given me the previous evening at approximately 5:15, 5:20 to give to Bethlehem had been passed on to them. I said "No, it had not."

He said "Do not do so."

This was approximately 9:00 in the morning. Shortly thereafter, 9:30 to 10 o'clock we had a Telex from National Shipping saying they considered the negotiations suspended as no agreement had been reached.

THE COURT: Have you got a copy of that Telex that you received?

THE WITNESS: Yes.

THE COURT: I don't like to do this, Mr. Estabrook. Forgive me.

THE WITNESS: No, I don't have that. I have the one that we sent quoting it.

THE COURT: We want the Telex that you say you received from Hellenic or from National.

THE WITNESS: I don't have that one with me. I have the copy that was --

THE COURT: Have you got it, Mr. Gilchrist?

MR. GILCHRIST: Yes.

THE COURT: Mr. Gilchrist produces from his files a copy of the Telex sent on what date?

THE WITNESS: March 24.

THE COURT: 1971?

THE WITNESS: Yes, sir.

THE COURT: Is that what you are looking at now?

THE WITNESS: That is correct.

THE COURT: Let us mark it now for identification.

MR. ESTABROOK: May I mark this?

MR. GILCHRIST: Yes.

(Plaintiff Petitioner's Exhibit 5 marked for identification.)

xxxx

THE COURT: Is this Plaintiff Petitioner's Exhibit 5 the Telex that you received?

THE WITNESS: Yes. I do have it here. That is the receipt from -- I do have the copy of our Telex.

THE COURT: He's got the original. Better to mark the original.

Do you offer it in evidence?

MR. ESTABROOK: Yes, I do.

MR. GILCHRIST: No objection.

THE COURT: Received in evidence by consent.

(Plaintiff Petitioner's Exhibit 5 received in evidence.)

xxx

THE COURT: Please let me read it.

(Pause.)

THE COURT: All right, you may continue.

Q Before you received Exhibit 5 had you received any communications as to whether or not Hellenic was a subsidiary of National?

A I have no Hellenic communications, no.

Q Had you received any communications as to the charter rate, $5.60 a ton?

A No, sir.

THE COURT: When you received Plaintiff's Exhibit 5, what did you do? Did you send any Telex to Interocean?

THE WITNESS: Yes, I sent it right on to Interocean, quoted it directly.

THE COURT: Have you a copy of your Telex that you sent to Interocean?

Q Is this the copy of the Telex you then sent to Interocean?

A Yes, sir.

Q What time did you send it?

A It was sent at 11:35 in the morning.

Q What time did you receive the message from National?

A 11:30.

MR. ESTABROOK: I offer this Telex to Interocean as

Exhibit 6.

THE COURT: Any objection?

MR. GILCHRIST: No objection, your Honor.

THE COURT: Received in evidence by consent.

xxx (Plaintiff Petitioner's Exhibit 6 received in evidence.)

THE COURT: Did you also send a copy of this Telex to National Shipping?

THE WITNESS: No, sir, that is the one I had received from them.

THE COURT: You didn't send them a copy of this? This is the one you sent to National?

THE WITNESS: To Bethlehem Steel.

THE COURT: To Interocean?

THE WITNESS: That is correct.

THE COURT: Did you get a reply to this?

THE WITNESS: I got a telephone call. I don't recall --

THE COURT: You may continue, Mr. Estabrook.

MR. ESTABROOK: Yes, sir, thank you.

THE COURT: He said he got a telephone call.

9 Q Who did you get your telephone call from?

A Mr. Germano.

Q What did he say to you and what did you say to him?

A I asked him if he had gotten the Telex that I had sent and he said, yes, he had and that they were going to discuss it internally and get back to me.

Q What happened then?

A Well, they got -- I don't recall the exact timing of it but Mr. Germano called back and said they would accept the drydocking clause and TOVALOP fees for their account.

MR. GILCHRIST: This is after you had passed the Telex?

THE WITNESS: That is correct.

Q What happened then?

A I passed that information on to Mr. Spears on the telephone.

Q What did he say?

A He said there was no reason to discuss it; that the Telex stood for itself.

Q What was the state of the market at this time?

A As I recall, it was starting to fall.

Q Did you continue to act in connection with the Oswego Reliance after this?

A Yes, we did.

Q State briefly what you did?

A There were a series of Telexes that went back and forth at later dates. Bethlehem, Interocean, then had to charter the vessel out on the spot market because the vessel was practically prompt. They sent a Telex each time saying what they were going to do, which we forwarded on to National.

Q Did National change their position after Mr. Spears' Telex on March 24?

A Not to my knowledge.

Q I show you a paper and ask what this is?

A It is a draft form of a letter of guarantee.

Q Who prepared it?

A It does not say so on here, but similar to ones that I prepared.

MR. GILCHRIST: What?

THE WITNESS: There is no indication on here that I actually typed this one, but it is similar to ones I have prepared, the same verbiage.

MR. GILCHRIST: Did you prepare it?

Don't you know?

THE WITNESS: We prepared one like this. I don't say that this particular copy I typed, that our office typed because there is no indication on here.

Q Did you prepare a draft form guarantee?

A Yes.

Q What did you do with it?

A I sent a copy to Mr. Germano.

Q Did you send a copy to anybody else?

A No, I did not.

MR. ESTABROOK: Mark this as Exhibit 7 for identification, please.

xxxx (Plaintiff Petitioner's Exhibit 7 marked for identification.)

MR. ESTABROOK: You may examine.

THE COURT: Don't you offer it in evidence?

MR. ESTABROOK: I will offer it in evidence now.

THE COURT: Any objection?

MR. GILCHRIST: I have no objection as such, your Honor.

THE COURT: All right, received in evidence.

xxxx (Plaintiff Petitioner's Exhibit 7 received in evidence.)

THE COURT: Cross examine.

MR. ESTABROOK: I have one more thing, your Honor.

THE COURT: Do you reserve your cross examination now and wish to call your witness?

MR. GILCHRIST: Yes.

THE COURT: You have no objection to that, Mr. Estabrook?

MR. ESTABROOK: No, I have not.

THE COURT: Call your witness now out of turn. Will you please wait, sir?

THE WITNESS: Yes, sir.

(Witness excused.)

MR. ESTABROOK: I had forgotten to put in evidence the Mobil time form charter, so if we put the other witness on now I will call Mr. DeSalvo back to put it on later.

THE COURT: Is this conceded to be a copy of the Mobil form charter?

MR. GILCHRIST: Did you have a letter of transmittal?

MR. ESTABROOK: Yes, but I wanted to put that one in because that one shows the date it was printed.

THE COURT: We will do it later on before the cross examination begins.

Do you want a recess for five minutes?

MR. GILCHRIST: Yes, if your Honor please.

(Recess.)

THE COURT: Call your witness.

MR. GILCHRIST: Mr. Porvaschez, please.

JACK PORVANCHER, called as a witness in behalf of the Respondent, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GILCHRIST:

Q Mr. Porvancher, what is your present position?

A I am president of Great Eastern Associates.

Q What is Great Eastern Associates?

A Great Eastern Associates is a firm engaged in marine insurance and average adjusting in New York City.

Q How long has it been in existence?

A The firm was founded November 1, 1956, some 17 years ago.

Q How long have you been in marine insurance yourself?

A I started in marine insurance in 1946 as an average adjuster, training as an average adjuster, and gradually worked my way into the marine brokerage end of the business.

Q Can you give us a brief resume of your experience in this field, Mr. Porvancher?

THE COURT: May I ask a question at this point? Just what do you hope to prove by this witness? You are not going to have him testify here as an expert on marine law, are you?

MR. GILCHRIST: No, your Honor. Mr. Porvancher is being offered as --

THE COURT: This case has nothing to do with average adjusting.

MR. GILCHRIST: Mr. Porvancher is being offered as an expert witness on marine insurance.

THE COURT: Yes.

MR. GILCHRIST: And I intend --

THE COURT: An expert in what field?

MR. GILCHRIST: The whole field of marine insurance, the placing of marine insurance, the coverage you should have.

THE COURT: Marine insurance brokerage?

MR. GILCHRIST: Correct.

THE COURT: What is customary from a broker's point of view?

MR. GILCHRIST: Yes.

THE COURT: I will take it.

Q Can you give us a brief resume of your experience in this field?

THE COURT: Maybe Mr. Estabrook would concede he is a qualified marine insurance broker.

MR. ESTABROOK: I will concede that. Mr. Porvancher is a qualified marine insurance broker.

THE COURT: Familiar with the market here in New York and practice here in New York.

Q Do you do the marine insurance brokerage for National Shipping?

A Yes, I do, sir.

Q How much of your overall business does the National account represent?

A Approximately 10 per cent of our overall marine business.

THE COURT: How long have you been writing that insurance?

THE WITNESS: I have been writing their insurance from about 1958.

THE COURT: And they are a good account?

THE WITNESS: Yes, they are, sir.

Q How much of your business, Mr. Porvancher, is with tankers as opposed to the dry cargo segment of the shipping tonnage?

A We place about 75 per cent of our marine brokerage involving tankers. The rest would be the dry cargo and other types of vessels.

L10

Q Would you explain for the Court what a Protection and Indemnity Club is?

A A Protection and Indemnity Club, which is normally

referred to as a P & I Club, is a group of shipowners who have banded together to share, in effect, each other's losses stemming from casualties at sea and it is a very all-encompassing group of accidents that the club covers other than the basically the physical damage to a vessel's hull.

The ship owners through this club will appoint a manager. Normally each club has a manager. That manager administers the club, takes care of settlement of the losses and really one of the most important features of a Portection and Indemnity Club is that it provides a worldwide network of representatives to assist the vessel owner in the event he requires the need primarily of legal advice, security, providing of security at a moment's notice. This is really what a P & I Club is standing in an owner's place to do.

THE COURT: I am familiar with what it is, but the record should have it because it may go to somebody who is not familiar with it. Is it like one of these associations called the London Worldwide which covers the Carribean?

THE WITNESS: The London Steamship Mutual Club, the United Kingdom Club is about your largest and the West of England Club could be involved.

THE COURT: All right.

Q Is it customary for owners who have Protection & Indemnity coverage to be entered with such a club?

A Well, I have been brokering for 17 years and during that time we have had about three shipping depressions. Owners will do everything in respect of minimizing their insurance coverages with one exception and that is they never get rid of their P & I insurance because what P & I insurance -- and even as a broker we would say to them: "Without P & I insurance you might as well take your ship and lay it up. You just can't operate."

If I can go one step further and explain that an owner will take his chances in a bad market and run his vessel with a minimum of insurance, become a co-insured.

Q You mean as to hull?

A As to hull. But his P & I, his protection and indemnity insurance -- if he finds himself in an outport and a crew member falls into the hold and breaks his arm, he wants $100,000 security posted. A P & I Club's representative will provide that security and the vessel can move. The claim at the end of the day may be a thousand-dollar claim, but that $100,000 has to be posted, so when an owner finds himself in the position like that his

ship doesn't move.

THE COURT: The ship is liable?

THE WITNESS: The ship is liable, is seized and will not move. Therefore, he will do everything to economize except not maintain his P & I insurance. I have brokered for 17 years. I have never done a vessel's hull without doing its P & I and I have done P & I and not done the hull.

Q Can you explain, Mr. Porvancher, from the point of view of a charterer entering into a one-year time charter with a tanker owner what the advantages are to the charterer of knowing that that owner is entered in a P & I Club?

A I think the most critical point from the charterer's standpoint would be that if he knew there was a P & I entry in existence he would know that he could consider that other than from a marine casualty which would cause damage to the vessel, that that ship could perform without delay, without any delays.

But what invariably happens from my own experience is on a Friday night or the night before a holiday attorneys have a habit in the event of a claim of going into Court and seizing a vessel at 5 o'clock on a Friday night. If there is a P & I entry the club's representative can provide the security which is provided immediately

because they are known worldwide, recognized clubs are known worldwide and a club's representatives letter or undertaking will be accepted and the ship will be released, but without a P & I entry the charterer would find himself with a vessel sitting in a port until such time as the owner could provide security which would satisfy the local ports and what an owner might consider to be satisfactory security in many instances and in many countries is not acceptable. They want either a banker guarantee or they want the cash there and ships have found themselves just sitting idly waiting until such time as a security is posted, so I think a charterer would be vitally interested in knowing that the owner has P & I insurance and I would bring in one other point.

It is becoming even more common today for the time charterer to turn around and insist that the owner name him as assured within his own policy and your P & I Clubs are leaning in that direction to assist. Sometimes they take exception, but in many instances they are going along with this procedure.

Q Mr. Porvancher, would you explain for the Court exactly what TOVALOP is?

I know your Honor is familiar with it.

THE COURT: You go ahead and put anything you want

on the record.

A The letters TOVALOP stands for Tanker Owners Voluntary Agreement concerning limitation or concerning legal liability for Oil Pollution. If I may, I would like to read from the handbook of ship owners which was prepared by the West of England, I think the second largest protection indemnity club in the world, in which they state as follows:

"TOVALOP is a scheme initiated by the major oil companies. It takes effect as an agreement between participating tanker owners to reimburse national governments for expenses reasonably incurred by them to prevent or clean up pollution of coast lines as a result of the negligent discharge of oil from a participating tanker and subjected to a maximum of $100 per gross registered ton or $10 million, whichever is less. Under the agreement a participating owner is bound to establish and maintain his financial capability to fulfill his obligations under the agreement.

"TOVALOP also contains provisions to encourage a participating owner to take reasonable measures to prevent potential damages by pollution and to mitigate damage by pollution from the discharge of oil. The P & I Clubs have made arrangements whereby a member who

has signed agreement can be covered for his liabilities thereunder by his own club. This is of particular importance since most oil companies will not charter a tanker unless the owner is a party to TOVALOP."

This document was written by Michael Holman, who is the manager of the West of England Steamship Owner's Association in 1971. I have an extra copy.

MR. GILCHRIST: May we mark that for identification?

THE COURT: I don't think we need that. You can mark it. I have seen it. Put it in for identification.

(Defendant Respondent's Exhibit A marked for identification.)

xxxx

Q What is the relationship of TOVALOP to protection and indemnity cover nowadays, and when I say nowadays I mean as of 1971.

A TOVALOP is the scheme itself whereby the owner by his entry signifies that he is financially capable to take care of oil pollution claims which may arise up to the limits subscribed by the TOVALOP agreement, which is $100 per GRT or $10 million, whichever is less. Once he executes the TOVALOP agreement forms and submits it to the managers of the TOVALOP club in London, which is known as the International Tanker Owner's Pollution Federation -- they

are the administrative arm of the TOVALOP plan -- at the same time he must signify to the Federation how he proposes to make good in the event a claim is brought upon the Federation for an oil pollution.

That method of showing financial responsibility can be done one of several ways. The P & I Clubs all afford their members, their tanker members, the privilege of arranging the TOVALOP entries via them, and it simply entails asking your protection and indemnity club, indicating to them that you would like to become a member and the forms are sent to you completed and you are a member. That is about what it amounts to. It is a separate charge which the club assesses of the tanker members because the club has tanker and dry cargo members. Therefore, it is treated as a separate charge made against the tanker members.

Q Can you identify this document for us, Mr. Porvancher?

A Yes, this is the 1971 rule book of the United Kingdom Mutual Steamship Owners Association.

Q Does it provide to its tanker-owner members provision for TOVALOP cover?

A It provides to cover the owner in the event of a TOVALOP liability. Yes, it does.

THE COURT: Only against claims of a national government?

THE WITNESS: National government.

THE COURT: Not against local owners and not against local governments?

THE WITNESS: That is right. TOVALOP aids basically national governments in cleaning up coastlines.

THE COURT: Coastlines where title is vested in the national government rather than in the local government?

THE WITNESS: That is right, sir.

THE COURT: Do you want to mark this for identification?

MR. GILCHRIST: Yes.

THE COURT: Just for the purpose of having it in the record, that is all.

(Defendant Respondent's Exhibit B marked for identification.)

xxxx

Q Can you identify this document for us, Mr. Porvancher?

A This document is the TOVALOP Handbook or manual which is normally given to each of the TOVALOP members along with a certificate of evidence that he is a member of TOVALOP and normally if retained aboard the

vessel along with the certificate. It assists the master in having an idea as to what TOVALOP covers and what he is to do in the event of a claim.

MR. GILCHRIST: I ask that that be marked for identification, your Honor.

THE COURT: Have it marked.

MR. ESTABROOK: This is the 1972 amendment.

THE WITNESS: There is a reprint, sir, 1973.

MR. GILCHRIST: This incorporates the amendments through the 14 July, 1972.

Q Do you know, Mr. Porvancher, what the percentage is of the world tanker fleet that is entered in TOVALOP?

A Yes, I do, sir. As of July 14, 1972 some 99 per cent of all the tanker tonnage in the world was entered, excluding government agency or owned tankers and tankers under 3,000 gross registered tons.

Q Do you know of any figure for the percentage that was entered into TOVALOP as of the end of March, 1971?

A I would really answer in this manner: For TOVALOP to become effective in October 1969 there was in excess of 50 per cent. By the end of 1971 I believe the figure was somewhere close to 80, though I think you might strike a happy medium and figure that there have been

somewhere between 65 and 70 entered after that time. But it would be a guess as to the exact amount that given moment.

(Defendant Respondent's Exhibit C marked for identification.)

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MR. GILCHRIST: Your Honor, I want to show the witness a document which I take it counsel will stipulate with me is a copy of the charter party actually signed by Interocean and forwarded to National on March 25.

THE COURT: Yes. Received in evidence, then, by consent.

MR. GILCHRIST: I take it, your Honor, that counsel intends to put this in when he recalls Mr. DeSalvo.

THE COURT: I don't know whether he does or not. Put it in evidence as a respondent's exhibit. You are offering it.

MR. GILCHRIST: I prefer to mark it one that was sent to us. I will offer this in evidence, then, your Honor, as Defendant Respondent's Exhibit D.

THE COURT: What is the date that this was sent?

THE CLERK: March 25, your Honor.

THE COURT: It is dated March 25?

MR. GILCHRIST: Your Honor, this is from Mr. DeSalvo, Poten & Partners covering letter of March 25

which was passed by hand and is date stamped at National, 1971, March 25, 5:33 p.m.

12/ Q What date was it signed and dated by Interocean?

MR. ESTABROOK: March 25 at 10:00 a.m., your Honor.

MR. GILCHRIST: It is typed here, your Honor.

THE COURT: It says at 10 o'clock in the morning of March 25, 1971. Is that after the Telex from National and from Hellenic was received and sent in which they repudiated the contract and said there was no contract?

MR. GILCHRIST: Except for the repudiated.

The Telex sent National stating negotiations were ended was sent on March 24.

THE COURT: They said there never had been a contract.

MR. GILCHRIST: That is right.

THE COURT: What exhibit is that, Mr. Estabrook?

MR. ESTABROOK: It was five, I believe, sir.

(Defendant Respondent's Exhibit D received in evidence.)

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MR. GILCHRIST: Did your Honor want to see that?

THE WITNESS: I wanted to get the number of the Plaintiff Petitioner's Exhibit.

THE COURT: That is Exhibit 5, which is dated

March 24. All right.

What particular significance do you want the Court to attach to this, Defendant's Exhibit D?

MR. GILCHRIST: I want to show it to the witness, your Honor. I just wanted to get it into evidence.

THE COURT: It is in evidence now. You have no objection to it, have you?

MR. ESTABROOK: No.

THE COURT: It is in evidence as having been a document sent by the plaintiff.

Q Mr. Porvancher, at my request have you previously examined this Mobil Time Charter Party dated as of March 17, 1971?

A Yes, I have, sir.

Q Have you an opinion with regard to this charter party with respect to its insurance provisions?

THE COURT: Objection sustained. I don't want his opinion. I ask you what significance do you want me to attach to this exhibit? Would you take a look at it? I ask you as the attorney. We used to call you proctor. I always liked the expression proctor. What significance do you want me to attach to this?

MR. GILCHRIST: My offer of proof would be, your Honor --

THE COURT: I don't take an offer of proof.

MR. GILCHRIST: The significance to be attached is that one of the standard printed clauses, Clause 23, has been deleted.

THE COURT: Has been deleted? And I wanted to ask Mr. Porvancher -- that is the insurance.

MR. GILCHRIST: That is right, your Honor.

THE COURT: Is there any other significance that you want me to attach to this if I examine this?

MR. GILCHRIST: I will have other points to make, but I wanted to bring out with my insurance expert his opinion with respect to the fact that this clause is deleted.

THE COURT: I don't want his opinion on that. You have an exception to my ruling. It is deleted. Its significance is for the Court to determine.

MR. GILCHRIST: I have no further questions.

THE COURT: I will give you an exception to my ruling, in order to get your record complete I will let the witness answer it so that it will be complete. I am not paying any attention to it. I am so advising you now. But I want your record to be complete for the purposes of review, so if it is appealed, if an adverse decision is given the Court of Appeals won't have to send it back for another trial.

Q Mr. Porvancher, you heard this colloquy, I take it and what the Judge has said that he is going to permit --

THE COURT: You don't have to tell him what your opinion is as to the effect and importance of this clause which was deleted, clause No. 23.

THE WITNESS: The clause stipulates that the owner at its expense throughout the period of the charter shall have the vessel fully entered in a P & I association in good standing in both protection and indemnity classes. That clause has been eliminated and I think that the clause itself is an important consideration for the time charterer, not because of the fact that he would enjoy any of the benefits of the owner's coverage, but the mere fact that the time charterer would know that a protection and indemnity policy was in existence would enable him to be able to act in a different manner in the handling of the ship after he takes possession of it. He wants to insure, as I said earlier, the continuity of employment. He knows that the ship may have to be taken out to do repairs brought about by an accident at sea. This he has no control over.

But he certainly wants to be sure that if at the end of the day if there is a crew sickness, injury claim,

stevedore injury claim, cargo loss or damage, collision liability for which the club bears 1/4 of the responsibility, damage to a fixed object, pollution other than under a TOVALOP entry, that that ship will perform for him 365 days a year.

Without the P and I insurance he is always faced with the problem, assuming that let us say he sub-charters the vessel that he cannot perform for the sub-charters the vessel that he cannot perform for the sub-charterer in the same manner that he would like to and in the same manner that he handles his other vessels.

He has certain standards in the way he does business presumably and therefore he would want a vessel to be entered for P & I. It would be unusual not to find it in a contract.

MR. GILCHRIST: Thank you, Mr. Porvancher. Your witness.

CROSS EXAMINATION

BY MR. ESTABROOK:

Q Mr. Porvancher, do you have such a thing as charterer's entry in Protection and Indemnity Insurance?

A A charterer can purchase charterer's liability insurance for his own account, yes, sir.

Q Is it also true that there --

THE COURT: Wait until we understand what you mean by that. By that I think you mean it that the charterer or sub-charterer could at his own expense get the same insurance which would have been provided had not 23 been crossed out?

THE WITNESS: It is not the same, sir. In other words, charterer's liability insurance which he can normally purchase -- first of all, it is a protection should he be ultimately found liable.

Secondly, the deductible features which are normally implied to a charterer liability policy are far in excess of what would normally be under an owner's coverage.

13/ Third, in the event of a claim nine times o of 10 or 99 times out of a 100 it is not a claim for which the charterer is liable. It is one for which the owner is liable, so they will in the first instance seize the ship.

Now, at the end of the day the charterer is liable the charterer will have his own insurance, but I don't relate charterer's liability insurance which in many instances is not even purchased through a club but purchased in the open commercial market and there is a complete difference of opinion as to whether Lloyds

is prepared to put up security on a charterer's liability claim as opposed to whether a P & I Club will put it up.

Q P & I will sometimes grant charterers liability coverage but under very restricted conditions, is that correct?

A Are we talking about the club or the commercial market?

THE COURT: On the commercial market.

THE WITNESS: Yes, there is coverage available.

Q It is also true that certain fleets that are self-insured have a self-insurance plan?

A Are you talking about hull or P & I?

Q P & I.

A Who would there be --

Q Are you familiar with the Exxon fleet or Esso?

A Yes, I am.

Q That is self-insured, is it not?

A I can't comment on that. I don't know.

Q Are you familiar with the Bethlehem Steel fleet?

A I know of the Bethlehem Steel Fleet, yes, sir.

Q That is self-insured. Is it a self-insurance plan?

A I don't know.

Q Then you are not familiar with ships that are

self-insured?

A No, I would not say that either, sir, because I have found two groups of ships that are self-insured and if I may mention one would be the Mobil Oil fleet at one time. But I would also point out that when the Mobil Oil fleet was self-insured it was administered by my original employer, Francis E. Carr & Co. in 1946 and was retained by Mobil Oil Company and their function was to advise Mobil Oil annually what to set aside for insurance. They then in turn ran a regular insurance fund as if they were a private business. We would prepare average adjustments for them. They allocated the money. They treated it as a business.

The second group of self-insured are owners that are not financially able to insure. They don't have the funds.

THE COURT: Did you ever hear of Kalmar Steamship Company?

THE WITNESS: I have heard of the company, yes, sir.

THE COURT: Who owns Kalmar?

THE WITNESS: I don't know, sir.

THE COURT: Who operates under that name?

THE WITNESS: I don't know.

THE COURT: Did you ever hear that

Bethlehem operates under that name or did operate under that name?

THE WITNESS: No, sir. I know Bethlehem Steel Company as Bethlehem Steel Company.

Q Do you know Bethlehem Steel Company as a solvent corporation?

A I can't really comment on that, sir. I haven't studied their financial statements.

THE COURT: But you recognize that in the industry there are companies that own ships who are ship owners who carry or who are self-insurers?

THE WITNESS: I recognize there are some, but I think you must really, sir, break it into two units. Many of them are self-insured in respect of their hull. Many of the largest companies in the world are not self-insured when it comes to P & I. They draw the line at that point. Many of the largest companies which are self-insured are not really self-insured. They carry major catastrophe.

Q You mean over 10 million?

A Over a certain amount.

THE COURT: Excess insurance?

THE WITNESS: Yes, sir, they are willing to take a certain amount of risk.

Q As an insurance broker you believe in insurance, don't you?

A I believe in insurance, yes, because I feel that it serves a very important function. Self-insurance can be very misleading sometimes.

Q But you do recognize that a self-insurance program can be set up with an insurance manager?

A Yes, definitely.

Q And funds allocated to insurance?

A Yes. If it is run properly.

Q TOVALOP represents something over and above the P & I Club, does it not?

A That is right.

Q In addition a member with P & I insurance would have to make application to TOVALOP over and above that?

A If he desires an entry with TOVALOP and it is tanker tonnage, yes, he would have to.

Q Now, TOVALOP originally started for tanker tonnage, did it not?

A Yes, it did, sir.

Q And it is limited to tankers, is it not?

A Well, tanker O Boats.

Q What is an Ò Boat?

A A ship capable of carrying in effect bulk cargos

and oil simultaneously or separately. It depends on the conception of the vessel.

Q Are you familiar with the TOVALOP regulation as to O Boats?

A I think it is too general a question, sir. I don't know what you are driving at. You will have to be more specific.

Q When a vessel is not carrying petroleum products but is carrying bulk products is it covered by TOVALOP?

A By bulk products you are talking about ore?

Q Ore, grain.

A It is covered by TOVALOP?

Q Yes.

A There would be no need for it as far as I know as long as she is not going to be engaged in the carriage of oil.

Q If she is engaged in the carriage of oil only part of the time there would not be the same need to be covered by TOVALOP?

THE COURT: Unless it is bilge oil that --

A No, because in the construction of certain oboes they have the capacity of carrying oil --

THE COURT: We are talking about coverage of

TOVALOP. If they spill oil, fuel oil from their fuel tanks or they pump out contaminated bilge water with oil and pollute the nationally-owned property, that is covered by TOVALOP, isn't it?

THE WITNESS: Yes, if it comes from the vessel. Yes, I believe it does.

Q However, you don't use TOVALOP for bulk carriers, do you?

A For bulk carriers?

Q Yes.

A No, sir.

MR. ESTABROOK: That is all.

THE COURT: All right.

MR. GILCHRIST: I have a little redirect, your Honor.

THE COURT: Yes, sure.

14/ REDIRECT EXAMINATION

BY MR. GILCHRIST:

Q Mr. Porvancher, would you expect that a charterer's P & I coverage would obtain for that charterer the release of the vessel were it to be arrested?

A No, sir, I would not because if it was arranged through the club it would definitely not be.

It would be looking to the owner to obtain its

own release. If the charterer's liability was arranged on the commercial market, Lloyds does not provide for the posting ever direct. Lloyds will give counter-security but it will not provide security in the first instance. It never does.

Q So in that respect for a charterer to take out charterer's liability cover is not to obtain the same thing as having the vessel entered by the owner in a Protection and Indemnity Club?

A That is correct, sir.

Q With respect to the matter again of bonding the arrest of a vessel, would you anticipate there might be some differences in the situation between a vessel whose owner has her entered in a P & I club and one whose owners are self-insurers?

A In my view there would be some very definite differences, because as I said previously, with the world-wide organization that clubs maintain the various court authorities in the most out of the way places are familiar with the clubs' agents and they know that if the clubs' agents indicate that security will be posted or give their undertaking to satisfy the courts the vessel will be released.

But if you had a vessel sitting in Abadan --

MR. ESTABROOK: I object to this and I move that it be stricken.

THE COURT: We will let it stand.

MR. ESTABROOK: The witness is not familiar with the Bethlehem Steel financial picture.

THE COURT: You are going to prove that by a witness?

MR. ESTABROOK: I will.

THE COURT: We will let him put it in if he wants to. I am not paying attention to it, but if he wants to make a statement he can. I want the record to be complete here.

Q Had you finished, Mr. Porvancher?

A No. In finishing I was going to say that in the event you offer security in an outport the security may eventually be accepted but you may lose three or four days, depending on the time factor.

If I may use an example, we just had a vessel in South America at Carnival time. We had the club security posted before the beginning of Carnival time. We got it at the very last moment, otherwise for like a week to 10 days the ship just sat there. It may be true that a company, Bethlehem or otherwise, might satisfy the courts eventually but that 10-day period is critical to

an owner if she is just sitting idly.

MR. GILCHRIST: That completes my redirect, you Honor.

THE COURT: All right. Thanks very much.

THE WITNESS: Thank you.

(Witness excused.)

THE COURT: Call back your witness now for cross examination.

F R A N C I S E . D E S A L V O , resumed and testified further as follows:

CROSS EXAMINATION

BY MR. GILCHRIST:

THE CLERK: May I remind you, sir, you are still under oath.

THE COURT: Go for about 10 minutes. Then we will adjourn for lunch.

Q Mr. DeSalvo, what is your position at Poten & Partners?

A I am a chief executive officer and a broker.

Q You said chief executive officer. What exactly is the title?

A Chief executive officer, chairman of the board, whatever you want to call it.

Q Are you a partner of the firm?

A It is not a partnership. It is a corporation.

Q Are you a stockholder in the firm?

A Yes, I am.

Q How much brokerage would Poten & Partners have made if this charter party had been executed by both parties and performed over its full term?

A I don't know the exact number. You can run the figures. It is approximately 50,000 tons at $5.60.

Q Times 12 months times one and a quarter?

A That is correct.

Q Would you agree with me that it is correct arithmetic (indicating)?

A I think we are out $40,000.

Q Does that look right?

A Yes.

THE COURT: Approximately $40,000.

Q You have billed Interocean, I take it, for the brokerage?

A No, we don't bill for brokerage unless freight is received. Brokerage is only earned if freight is paid.

Q Let me be clear about something. I take it that it is your contention that not only was a fixture made on March 17, 1971 but that a fixture remained in effect right on up through March 24 when you received the Telex

from Mr. Spears; is that correct?

A That is correct.

Q Have you re-read this statement of yours given on April 6, 1971 recently?

A I read it over the weekend.

Q And are the answers that you gave to Mr. Kelley's questions on that date fresh in your mind?

A No, I would have to look at it again.

Q Would you like to take a copy of it now?

A I have a copy.

THE COURT: Has it been received in evidence?

MR. ESTABROOK: Marked for identification, your Honor.

THE COURT: Has it been received in evidence?

MR. ESTABROOK: Not yet.

THE COURT: Do you want to offer it in evidence?

MR. GILCHRIST: It is a self-serving statement, your Honor. I am not about to offer it. I think it has some interesting admissions.

THE COURT: All right. This being an admiralty court, the court may take it into evidence after its own motion. Since none of you want to take it in evidence, I will take it in evidence.

MR. GILCHRIST: I intend to examine on it, but I would like to make our position about it quite clear. I

would like to know why it was taken when it was, how that came about and --

THE COURT: I want you to do that.

You both are reluctant to make it your evidence.

MR. ESTABROOK: I intend to offer it in evidence. I thought the proper time would be at the termination of Mr. Gilchrist's examination, but I will put it in evidence now if your Honor would care to have it before him.

THE COURT: No, I won't look at it. I think it should be in evidence as somebody's exhibit.

MR. ESTABROOK: Yes.

THE COURT: I will receive it in evidence and Mr. Gilchrist can cross examine him before I look at it. I won't look at it until you get through.

(Plaintiff Petitioner's Exhibit 4 received in evidence.)

xxxx

15

THE COURT: I am not going to read this because that would interfere with your cross examination.

MR. GILCHRIST: We are going to go through this in some detail. I prefer that you have it before you.

THE COURT: No, you go ahead with your cross examination. I will look at it when you are through with your cross examination. I will read it myself.

Q Let's go back to the beginning with respect now to this statement, Mr. DeSalvo. How was it that it came to be taken at all?

A When the Telex was sent saying negotiations were stopped.

Q What Telex?

A The Telexes that I referred to, I believe the 24th and the 25th from National Shipping, the ones that were passed on to Interocean saying that negotiations were terminated. Then Interocean asked that a statement be given as to the facts as I knew them.

Q You say Interocean asked. Let's have a date and who is talking to whom.

A Mr. Germano talking to me. I would not know the exact date or time that he did it but obviously between the 24 of March and the 6th of April.

Q He called you up, Mr. Germano did; is that it?

A That is correct.

Q What did he say to you?

A He asked if I could -- first he had asked if I could have lunch with him and legal counsel from their firm.

Q What did you say to that?

A I said yes.

Q Did you go to lunch?

A Yes, we did.

Q Do you remember the day?

A No, I don't.

Q Who was present?

A I believe Mr. Germano, Mr. Reese, Mr. Kelley.

Q Was this the same day that the --

A No, it was not.

Q The day before, two days before?

A Probably around the end of March. I don't know the exact date. Within, probably, a week after the Telex was sent.

Q Did the subject of taking this statement come up at that lunch?

A I don't think so. I don't remember, but I don't think so. It came up later.

Q What I am trying to get at is how it came about, Mr. DeSalvo, that you agreed to sit down with Mr. Kelley and nobody else present and be deposed, so to speak. How did it come about?

A Because if this was going to come to some disagreement he suggested it might be a good idea to put my thoughts down now while they were fresh in my mind rather than refer to it now by recollection two years

later.

Q So this was to make a memorialization of your understanding of the facts as to what had happened during the negotiations; is that correct?

A That is correct.

Q I take it, if that is so, then, that you and Mr. Kelley must have been at great pains to see to it that it was very accurate and precise, it being April 6 and only about six weeks after the event; right?

A To the degree we could, yes.

MR. GILCHRIST: Your Honor, this might be a good point to stop. I am going to wade into this. I will have a series of questions going on and on.

THE COURT: That is fair. We will recess until 2 o'clock.

(Luncheon adjournment taken until 2:00 p.m.)

AFTERNOON SESSION

2:00 p.m.

F R A N C I S E . D E S A L V O , resumed and testified further as follows:

CROSS EXAMINATION (CONTINUED)

BY MR. GILCHRIST:

Q Before going to this statement, Mr. DeSalvo, would you make a statement of how much of Poten's business is done with the Bethlehem fleet?

A At the time we did this particular deal I would say this was one of the first ones we had done. We fixed maybe one or two ships on the spot market, but I think this was the first time charter we had done at Bethlehem. Since that time I think we have done three ships on time charter of theirs out and one into them. As a percentage I would say over a period maybe two, three per cent.

Q Are you saying that this is the first business you worked with Bethlehem?

A I think it was the first time charter I did with Bethlehem, yes.

Q I asked you before we recessed, Mr. DeSalvo, whether you had billed Interocean for commissions because I understand it to be your position that you brought

about a fixture and if I recall correctly you answered that you had not billed for the reason that no freight was earned; am I correct?

A We don't bill for commission until freight is paid, correct.

Q Have you looked at the commission clause of this charter?

A I will. Yes.

Q What does it read?

A "Any commission which may be" --

THE COURT: What clause is this?

A Clause 36: "Any commission which may be payable as a result of fixing this charter shall be for the account of owner."

Q Reading that language now, don't you think you would be entitled to bill Interocean?

A Not until --

Q On your premise?

MR. ESTABROOK: This is a question of law.

THE COURT: It is cross examination. You see, this man has testified as an expert as well.

A We don't bill for commission until the freight is paid, so on a time charter when the hire is received by the owner for a given month, then we bill for commission

for that hire on a single voyage. If when the freight is billed and paid, then we bill for commission.

THE COURT: Do you as part of your work send out a bill from your office?

THE WITNESS: Yes, sir, we did.

THE COURT: For the owner?

THE WITNESS: On freight?

THE COURT: Yes.

THE WITNESS: In some instances, yes. Most instances, no.

THE COURT: The bill is ordinarily sent to the charterer by the owner?

THE WITNESS: That is correct. We usually get a copy and we bill commission based on that.

THE COURT: On a bill that is rendered?

THE WITNESS: That is correct.

Q So the record is clear, you have never invoiced Interocean for commissions with regard to the Oswego Reliance?

A No, I don't believe we have.

Q Turning to this statement taken on April 6, 1971, as I understand it you were called by Mr. Germano shortly after the Telexes of the 24th and 25th were exchanged and you went to lunch with them and discussed this whole

matter and it was agreed at that lunch that a record ought to be made of your recollections of these negotiations to have it at hand for whatever might ensue; is hat correct?

A No. No, I said at the lunch we discussed it but the question of taking the statement was a day or two later on the phone.

Q Whose suggestion was that? Who called you about that?

A I don't remember whether it was Mr. Germano or Mr. Kelley.

Q Can you explain for us who Mr. Kelley is?

A To my knowledge he is a lawyer for Bethlehem Steel or Interocean.

Q Is he on the house staff at Bethlehem?

A Yes.

Q In any event, he came up to your offices on April 6?

A Correct.

Q And you were sworn as a witness and Mr. Kelley then began asking you questions; right?

A That is correct.

THE COURT: Did he bring a reporter with him?

THE WITNESS: Yes, sir, your Honor, there was a court reporter, a gentleman like this gentleman.

THE COURT: Not a court reporter but a reporter?

THE WITNESS: Yes, with one of those machines.

THE COURT: A Stenotype machine.

THE WITNESS: Correct.

Q Who was present when this was taken besides Mr. Kelley, yourself and the reporter.

A The reporter and Mr. Germano.

Q So there were four of you all told?

A That is right.

Q Mr. Kelley, the reporter, Mr. Germano, yourself and nobody else?

A Nobody else.

Q You understood, I suppose, that you were being examined on behalf of Bethlehem; is that correct?

A That is correct.

Q To preserve your recollection of events on their behalf?

A No, I was putting a statement down on behalf of the facts as I remembered them, just to put it down on paper then.

Q And you were careful to get those facts accurately down?

A Yes, I was.

THE COURT: You had previously made your own personal recordings of what had happened on this paper which is in evidence?

THE WITNESS: That is correct, the notes.

THE COURT: This was after you had made it or was it before?

THE WITNESS: The notes were made during negotiations.

THE COURT: They were made contemporaneously with the negotiations?

THE WITNESS: That is right.

THE COURT: This was after them?

THE WITNESS: That is correct.

Q Do you have that exhibit, Mr. DeSalvo?

A No, I don't. I gave it back to Mr. Estabrook.

THE COURT: I suggest it would be best when introduced that you leave the exhibits in a pile in front of the clerk on the desk.

That is the exhibit of contemporaneous notes. What exhibit number is that?

MR. ESTABROOK: This has been marked as Petitioner's Exhibit 1 for identification, your Honor.

THE COURT: It has not been received in evidence?

MR. GILCHRIST: No.

THE COURT: All right.

Q Other than these two pages which have been marked as Petitioner's Exhibit 1 for identification, did you keep any other notes 'til you had this meeting with Mr. Kelley to make your memorial?

A No, I did not.

Q Do you have the statement in front of you?

A Yes, I do.

Q Why did you go off the record at page 3, if you remember?

A I would imagine -- I don't remember exactly, but I would imagine it was to make sure that was the correct date.

Q What would you have been checking?

A Checking my notes to see that was the proper date.

Q Petitioner's Exhibit 1, your notes?

A It doesn't have the date, but checking the calendar, Wednesday, Thursday, Friday versus 17th, 18th, 19th. It was easier for me to recollect the days of the week than it was --

Q As we go through this thing in sequence you are clear, are you not, that Wednesday was the 17th, Thursday the 18th?

A That is correct. That was the question here.

Q Friday the 19th and Monday the 22nd; right?

A Yes.

17/ Q I ask you to turn to page 4. You had -- and when I say you now I mean not your office but you personally -- you had previously done business with National, had you not?

A That is correct.

Q One or more times?

A More than once.

Q Had you also done business with Hellenic?

A I don't remember that.

Q Do you know whether your office had done business with Hellenic?

A I don't know.

Q Where did you get this information that you are reciting in your first answer on page 4.

A The original counter from Mr. Theodoracopulos.

Q You broke off from the question here which was: "Did you make inquiry of Interocean through Mr. Germano regarding the charter of a vessel?"

A Where are you, please?

Q That is the bottom of page 3. That is the question that was put to you by Mr. Kelley.

You answered: "On behalf -- I am going to have to spell this one out -- of Harry Theodoracopulos, who is the principal, I would say, of National Shipping and Trading of New York, of which Hellenic International Shipping S.A. is a subsidiary."

My question to you is: Where did you get that information that you are stating there?

A The first part that Mr. Theodoracopulos is the principal, from our continued dealings with him over the years. That is my understanding.

The second --

Q Did he ever say so to you in so many words or was it just your surmise?

A No, I would say he has said so.

THE COURT: I would suggest, counsel, that you let him finish his answer.

MR. GILCHRIST: Certainly, your Honor.

THE COURT: You asked him two questions at once. It would be best if you ask one question and give him time to answer.

All right, next question.

Q Did I hear you correctly to say that you believe Mr. Theodoracopulos did tell you that?

A At various times; not necessarily involved in this

negotiation, but at various times.

Q What is your answer to where you got the information about Hellenic being a subsidiary of National.

A That was in the first counter that we got when Interocean would not accept Hellenic as the charterer unless there was some backing by National Shipping, and I was told it was a subsidiary of National Shipping.

Q Who told you that?

A Mr. Theodoracopulos.

Q Do you remember when he told you that?

A That would be March 17 between 4, 4:15 in the afternoon.

Q You knew on Wednesday before you went to this luncheon meeting that the Oswego Reliance was a possibility for being worked?

A That is correct.

Q And you were contacted on or before the 17 by Mr. Theodoracopulos and invited to lunch; is that correct?

A That is correct.

Q Was anyone else present at the lunch?

A No, they were not.

Q Just yourself and Mr. Theodoracopulos?

A That is correct.

Q Would it refresh your recollection if I told you the name of the restaurant was Alfredo?

A That is correct.

Q What did you and Mr. Theodoracopulos talk about at that lunch?

A As I said earlier, the general market climate whether demand was going to be with us for a considerable length of time, whether the market was going to go up, go down, what was the general economic climate throughout the world, general conditions that would pertain to the future with the tanker market.

Q Did you discuss any specific vessels at the lunch?

A I don't believe we did.

Q Following lunch you got a call from Mr. Theodoracopulos

A That is correct.

Q And what did he say to you?

A He asked me what ships is -- the best I can recall, what ships we might have available in the 50,000-ton class for a short-term period.

Q What did you say to him?

A I said one that we had that was willing to fix it close to the then market was the Oswego Reliance, which I described to him.

Q What did he say to that?

A And he said to bring in an offer.

Q Bring in a firm offer; is that what he said, in substance?

A Yes.

Q And you went to Mr. Germano at that point; is that correct?

A That is correct.

Q And after discussion with him you worked up the terms of the firm offer; is that correct?

A He worked up the terms and gave them to me on the phone.

Q And if I recollect your statement -- I am not sure what the pages are penned -- you said you wrote that down, what appears there in the --

A Top part of the first page.

Q Yes, in black ink.

A That is correct.

Q Copying word for word as he read to you on the phone the terms of that firm offer you were going to put to Mr. Theodoracopulos; is that correct?

A I wouldn't say word for word. We have our own little shorthand in this business that I use and other people use, so it is substantially word for word. We don't dot every I on that.

Q Would you look at page 9 of your statement?

A Yes.

Q You are saying there, at about the middle of the page "that around 4:00 he" -- meaning Mr. Germano -- "gave me a firm offer for reply at 4:45."

A That is right.

Q Then you start reading from something and Mr. Kelley says to you:

"You are referring to your notes, Mr. DeSalvo?"

And you say "Yes, I am."

These are the notes that you --

A That is correct.

THE COURT: I call your attention, Mr. Gilchrist that by reading from that statement, Plaintiff Petitioner's Exhibit 1 for identification, you made it admissible. I also call to your attention the purpose of letting you use this is to bring out material matter, not to review it word by word, but you can continue it the way you are going if you desire to do so.

MR. GILCHRIST: I do, your Honor.

THE COURT: All right. Just tell me what you claim are the important statements in there rather than read them sentence by sentence. You can lay any background you want to do that. I'm not limiting or restricting you.

Q One of the terms that is in your notes that you read to Mr. Theodoracopulos is Mobil time sub details, is it not?

A That is correct.

Q Is sub details an abbreviation?

A No.

Q What does sub details mean to you?

A It usually means filling in the blanks, a technical description of the ship insurance valuation.

Q Is sub details a common term ordinarily used by brokers?

A Yes.

Q It is well understood by all brokers and all principals who are involved in trading vessels?

A I would say at times there is a difference of opinion as to what it means, but it is a standard terminology in an offering or a counter.

THE COURT: Sub details?

What details?

THE WITNESS: Subject to the details of completing the charter party form and other things than are actually described in the firm offer.

THE COURT: Did you refer to the details set forth in your Telex?

THE WITNESS: No, your Honor, the details, the basic offer lists the basic provisions of the charter party and the form, the sub details in the preamble, for instance, to the charter party, there are how many RPM's. The ship runs at the various speeds. Those things are never put in the actual offer.

18/ THE COURT: By "the actual offer" you mean the Telex communication?

THE WITNESS: That is correct.

Q Mr. DeSalvo, I would like to have from you exactly what you say sub details means in the brokerage business?

A I'd say there is a difference of opinion and it changes from time to time. It has changed since this one was done.

To me it means nothing materially changing, the charter party form or the specifics set out and actually stated in the form.

THE COURT: What do you mean? It meant something in 1971 which it doesn't mean today?

That I don't understand.

THE WITNESS: Well, the same question that is coming up here, your Honor, has come up in many other places of details, leaving an opening for one party or

another, so most negotiations today, because the market has been changing so rapidly, the whole charter party is actually fully done prior to -- at the same moment that you were confirming the ship.

THE COURT: Do you mean that today no charter is set forth in Telex form but you wait until the full, lengthy charter is typewritten and filled out?

THE WITNESS: No, for instance, Texaco now has a form which is two pages long of technical description of a ship. That part is given to the charterer at the same time you commence negotiations, so there is no question of these aspects. The insurance valuation is brought up at the time. Prior to this and at this time overtime was not -- was considered a detail. Some owners, then, if the market went up would ask for $15,000 a month overtime and it didn't become a detail anymore, so more and more these things have been concretely stated at the time of negotiations so what is a detail -- there are many, many less details today than there were five years ago or two years ago.

THE COURT: At the time this was made in March 1971 these Telex messages you have talked about weren't the details of the construction of the ship and of its equipment all contained in a manual, a register of

ships, which is open to everybody? Doesn't everybody have access to the Register of Ships or Lloyd's Manual.

A That is true, but it is up to the owner to tell the charterer this, which he does. The basics are given.

THE COURT: Isn't that a fact of common knowledge in the industry?

THE WITNESS: Yes, it is.

THE COURT: All the construction details of the ship, its draft, its weight, its type of engine power?

THE WITNESS: Yes.

THE COURT: Location of the fuel tanks and the bulkheads and the size, the capacity of the bulkheads; is that all set forth in this Lloyds Manual and wasn't it set forth in March 1971?

THE WITNESS: Yes, it was.

Q You lost me somewhere, Mr. DeSalvo. Are you telling the Court that all that sub details means is the technical items to be filled in in the blanks in the charter party form, the vessel's dimensions, et cetera; that that is all sub details means?

A The blanks that are yet to be filled in, such insurance valuation, which is not a technical detail.

Q You are testifying now not of what subsequently

became of this phrase but the way it was on March 17, 1971?

A I am saying that there are different interpretations.

Q I am talking about March 17, 1971.

A So am I. I am saying --

Q Mr. Germano gave you this phrase and you passed it on to Mr. Theodoracopulos?

A That is right.

Q What did it mean to you on March 17, 1971?

A To me it meant in this charter party those were the things to be resolved, the details to be filled in.

Q I want to know what the details are?

A Would you like to go through the charter party?

Q Certainly. Do you want to take Defendant's Exhibit D?

A Fine.

In the preamble, where the ship was built, what shipyard, again, your Honor, these things are available but they have to be verified by the owner and put in the charter party.

Clause 1, what is the net register tons? Where is she classed and how? What is the shaft horsepower, the RPM's? THere are many other in that same clause. Do you want me to go through each one of them?

Q I want to know what you mean by sub details?

A There are the fuel oil cubic. I believe it was not discussed at the time. The cubic of the vessel for oil was discussed. Summer Freeboard was not known. The clause that was crossed out there, the line that was crossed out, the first part of clause 1 little 8 or how you call that, 1A, little 8.

The vessel is not fitted with stern discharge. That is a technical fact. Clause 1C. The vesselwas not going to be drydocked and painted prior to delivery.

On the second page, Clause 2B. Since it is not a motor ship the reference to diesel all and ore do not apply.

Q Maybe I can save us a little time. Is sub details as you understood it on March 17, 1971 simply, as you first responded, filling in these blanks at the various pages, places where they occur?

A And changing the form.

Q And making deletions to conform to the actual dimensions and capabilities of the vessel?

A That is correct, to the actual facts.

Q But nothing more than that.

A Perhaps we are using different words to fill in the

technical details and to change the printed format where it obviously is at odds with the negotiations as they took place.

Q And the negotiations might involve more than the dimensions of the vessel.

A That is correct.

Q Isn't sub an abbreviation of subject?

A Subject to, right.

Q On March 17, 1971, if I understand you correctly you say that sub details meant one thing to some brokers and another thing to other brokers?

A I said it meant one thing in negotiating between some people and another thing between others, depending on what had been discussed at the time of negotiations.

19/

19 Q What are the other things mentioned on March 17, 1971 that --

A There are people that would not negotiate overtime, victualling expenses. Some people wouldn't negotiate the insurance valuation at the time of the negotiation. Some would negotiate address commissions. There are various items that in some charters they are there and in some charters aren't.

Q Was one meaning of sub details in the trade at the time: Subject to all the terms and provisions of the form mentioned?

A No.

Q To agreement on those?

A No, I wouldn't say so. When the form is stated in the negotiations it is intended to be incumbent on both parties to know what the form entailed.

Q When you set out the various terms you have here and then you also say sub details, does that mean that when you pass the form of the charter that is going to be executed that you can delete or add to any of these provisions as you see fit unless they are the subject of particular reference in the elements that you have mentioned?

A Not unless it is agreed by both parties.

Q There has to be agreement, hasn't there?

A It would on anything that wasn't talked about.

Q I would like you to answer me this question: Was one understanding in the trade of this abbreviation, sub details, "Subject to agreement on all the terms of the charter party"?

A No.

Q You don't think that anybody in the trade used it in that sense?

A I couldn't make a unilateral statement like that, but I would say it certainly was not customary for people to say it is something to be used to review the whole negotiation again.

Q There are a lot of elements that are not covered in the items that you show here and which went into the telex.

A Correct.

Q First of all, let's go back a moment. Is there everything that you have here in the telex? Do you want to study that carefully?

THE COURT: Showing the witness what paper?

THE WITNESS: This is plaintiff petitioner Exhibit 2.

MR. GILCHRIST: That, your Honor, is the alleged fixture telex.

THE COURT: I understand. I simply wanted to get the exhibit number on the record.

A I presume what you are making reference to is the telex does not say Mobil time sub detail.

Q It doesn't, does it?

A No, the telex does not.

Q But that is what Mr. Germano gave to you to pass to Mr. Theodoracopulos; right?

A That is correct.

Q Before you sent that fixture to Telex, of course you had read the original firm offer?

A That is correct.

Q To Mr. Theodoracopulos?

A That is correct.

Q When you read it to him did you read what you have in front of you in your notes?

A Yes, I did.

Q Including the term "Mobil time sub details"?

A Yes, I did.

Q Then why did you drop it when you came to send out this alleged fixture letter?

A I really don't know. I have no answer for that.

Q Did you think it was completely unimportant?

A No.

Q Now, the balance of this first page of your notes, Petitioner's Exhibit 1 for identification, I take it what is in red and above this line at the bottom now, you say that is your notes of Mr. Theodoracopulos' counter?

A That is correct. The checks at the time in red means he agreed to that provision.

Q You've got Mobil time sub details there?

A That is correct.

Q Is this the occasion you say that Mr. Theodoracopulos told you that Hellenic was a subsidiary of National?

A Yes, that is what I have written down.

Q Would you go to line 23? Mr. Kelly is asking you this:

"You passed this to Mr. Germano. What did Mr. Germano say to you?"

Do you know what is being referred to there?

A That is the counter proposal, counter offer.

Q Whose counter proposal?

A The first, where he said "You passed this along to Mr. Germano," that is I passed along Mr. Theodoracopulos' first counter offer. I believe it is the first.

Q And you answer at line 25 "he" -- meaning Mr. Germano; right?

A That is correct.

Q -- gave me a counter proposal back."

A That is correct.

Q And you say by that time -- this is not in my notes; this is recollection -- he had not been familiar with Mobil time that had previously looked at it?

A That is correct.

Q How did you know that?

A That is what Mr. Germano told me. It is my recollection of what he told me.

Q It was Mr. Germano, wasn't it, who asked for the Mobil time form in his initial firm offer?

A That is correct.

Q Going on on page 14, you say "Mr. Germano had seen nothing out of line to such an extent that he could accept the form."

That means the Mobile time form, I take it?

A That is right.

Q Which he was proposing?

A He proposed it at my suggestion since it was a form that was familiar to Mr. Theodoracopulos.

Q Pardon?

A It was a form that he offered at my suggestion since it was a familiar one to Mr. Theodoracopulos.

Q In other words, you told Mr. Germano that it

would familiar to Mr. Theodoracopulos?

A That he had done other deals on that format.

Q How did you know that?

A Because we have done them.

Q Have you got any here?

A No, I have not.

Q Which ones do you have in mind?

A I believe the Persian Commander, for one. I believe I have to go back in my memory a long way, but when I was doing the chartering for Amoco I believe we chartered in some ships in that form with him.

Q So you thought it would expedite matters, I gather, since you thought that Mr. Theodoracopulos was familiar and used to that form if Mr. Germano would cast his offer with reference to the Mobil time form; is that what you are saying?

A That is correct. There are four or five forms which are basically similar in most instances, but oil companies put different names on them for different publicity purposes or one reason or another, and it is usually simpler to pick a form that both parties are familiar with.

Q And it was your surmise that Mr. Theodoracopulos would be familiar with the Mobil time form?

A That is correct.

Q Now, on page 14 of this statement you say: "He" -- now, that means Mr. Germano; right?

A Which line?

Q Line 7.

A That is correct.

Q "He was still reviewing whether" -- now there is a question there -- "following clauses could be dropped in their entirety."

A Thatis correct.

Q That is 12A. I see. That is a mistake. That should have been"12AII."

These are the three clauses that refer to moneys paid for overtime over victualling for cables and back payment to the owner for heating the quarters, so rather than get into a discussion later as to how much money should be in each one at that time, people took those three out and negotiated the figures separately, which we did.

Q What you are saying here to Mr. Kelley on April 6th is that this was Mr. Germano's idea; is that right?

A No, it was my idea that we drop three clauses. Mr. Germano was reviewing whether he could drop the three clauses.

Q If it was your idea and Mr. Germano agreed to it then I take it that the dropping of those three clauses

would have been in the proposal that you related to Mr. Theodoracopulos on behalf of Mr. Germano?

A I believe it was.

Q I call your attention, Mr. De Salvo, to the fact that you have this dropping of these clauses shown here in your contemporaneous notes as having been put forward by Mr. Theodoracopulos?

A That is correct.

Q Which is right?

A They are put forward by Mr. Theodoracopulos, but the answer in page 14 says that Mr. Germano is checking whether he can live with the exclusion of those three clauses.

He, Mr. Germano, was still reviewing whether the following clauses could be dropped in their entirety.

Q Am I misreading here? Then what you are saying is thatyou had gone back with the counter offer?

A That is right.

Q And Mr. Germano is deciding whether he can agree to this proposal about these three particular clauses in the Mobil time form?

A Thatis correct.

Q Let's go over to page 15, Mr. De Salvo, line 12 where you state:

"Everything had now been agreed between the parties except the amount of money for overtime and petties, and the time in question here is still prior to 4:55 and on Wednesday, March 17, 1971;"correct?

A That was the time, correct.

Q Do you wish to make any modification to that statement or any correction of it?

A I would have to read the back pages to see the chronology of where that stands. Charter hire had not been agreed either.

Q There was all manner of details that had not been agreed, weren't there?

A There was nothing that was discussed in the offers and counter offers. That had not been agreed.

Q But that, of course, was sub details; right?

A That is correct.

Q Mobil time form?

A That is correct.

Q This is at the bottom of page 15 and the top of page 16.

I take it your answer there reflects that you are saying that he finally did agree on the rate of hire and on the amount for the petties?

A Right.

Q And you say at line 3 of the page 16:

"This was passed to Mr. Theodoracopulos who accepted his proposal resulting in the fixture telexes dated March 17, 1971."

Did Mr. Theodoracopulos say to you when you had your last phone conversation with him on Wednesday, March 17th "We have a fixture"?

A I don't know if that was the words he used.

Q Think back on it. Can you remember what words he used? You are stating a conclusion here. You would agree to that, wouldn't you? You say "who accepted his proposal resulting in the fixture telexes."

A It is terminology we use. Calling it a fixture telex maybe is not proper verbiage from your standpoint but --

Q Was it his word or your word?

A Calling it a fixture telex is probably my word. Whether he used that word, I don't recall.

Q Do you have any recollection now on Wednesday of Mr. Theodoracopulos having expressed himself to you as agreeing that there was a fixture?

A Yes, the verbiage --

Q Can you remember his words?

A No, I don't. Whether he said --

Q What did he say?

A Whether he said "I accept the last proposal," or whether he said "We are confirmed." Whether he said "You are fixed".

These are all terms that are effectively used in our business to mean the same thing. I wouldnot know the verbiage he used.

Q Weren't there open items at this point on March --

A Mutually agreed upon open items.

Q Give me an example of a mutually agreed upon open item.

A Drydocking clause.

Q What was agreed?

A It was agreed to work out the wording of a suitable drydocking clause for 15 days drydocking scheduled for November.

Q And that is all? Were there any others?

A There was a subject letter of guarantee guaranteed by National Shipping & Trading.

Q Where is that mentioned in the so-called fixture telex?

A The very top.

Q What form did you think a letter of guarantee would take?

A We had a form that had been used previously and I presumed that it would take probably the same form.

Q Do you have a copy of that form that had been used previously?

A I believe it has gone into the record. I don't have it.

MR. ESTABROOK: I believe it is Exhibit 7, Mr. Gilchrist.

Q This you say is a form that had been previously used on business that you had worked at Poten for National?

A Yes, I believe so.

Q Do you recall which charter that form was used in connection with?

A Yes, I believe it was the Persian Commander.

Q Poten has a copy of that charter party in its offices, has it not?

A Yes, they do.

MR. GILCHRIST. Can we agree that that will be produced, Mr. Estabrook?

MR. ESTABROOK: If you wish.

MR. GILCHRIST: I very much do wish.

THE COURT: Have it here. Do you have it in court?

MR. ESTABROOK: No, I don't. It is not in my office. It would be in Mr. De Salvo's office. He could bring it in tomorrow.

THE COURT: I thought we might complete his testimony today. All right.

MR. ESTABROOK: I don't have it.

THE COURT: You didn't serve notice to produce?

MR. GILCHRIST: I didn't serve a notice to produce this particular charter. We had served a notice to produce all relevant documents.

MR. ESTABROOK: Just stop right here.

THE COURT: We don't have to go any further. You know that is not a notice to produce. Next question. It does not describe the document.

MR. GILCHRIST: I am not going to make an issue on it, your Honor. I thought it simpler for Proten to produce this.

THE WITNESS: Let me make a note.

THE COURT: Tomorrow morning we will begin at 11 o'clock. I have motions. Tell each other what papers you wish and have them here by 10 o'clock so both sides can look at them.

Q What you are saying to us today is, of course, what you said on April 6th at page 19; is that right?

A Where are you referring to?

Q Lines 21 to 25.

THE COURT: I don't know what is in there. Why don't you ask him?

Q It says: "Mr. De Salvo, I hand you what purports to be a draft the guarantee of Harry Theodoracopulos and ask you if this was the form that you were referring to that has been executed by him in the past?"

THE COURT: That is the form we had marked as an exhibit.

Q And your answer was "Yes, it is."

A That is right.

THE COURT: That is marked as what exhibit?

THE WITNESS: Exhibit 7.

THE COURT: Thank you.

Q I would like to be clear on the basis of the conversations that you had with Mr. Theodoracopulos on Wednesday, March 17th and before you sent the so-called fixture telex. It was your understanding from your conversations with him that this was the form that he was going to agree to execute; is that correct?

A No, I don't know if that was the case. It was agreed that a guarantee would be given. I don't recall whether he said this particular form or whether it

was my assumption since we had used it in the past.

Q I take it you agreed that this Exhibit 7, which it was your understanding would be the form of the guarantee, if a guarantee was given, was never sent?

A No, never sent.

Q Why wasn't it sent?

A We never got to that point.

Q Let me see if I have this correctly, Mr. De Salvo. It is my understanding that on Friday the 19th you mailed a copy of the proposed Mobil form to National; is that right? I think you so testified here in a couple of places.

A If that is what it says -- I don't recall whether it was the 19th, but I'll refer to it.

THE COURT: Next question.

Q Would you agree that this is the copy that you sent to National in the mail on Friday the 19th?

THE COURT: Showing the witness what? Has that been marked in any way?

THE WITNESS: No, your Honor.

THE COURT: You should mark the paper that you showed the witness.

MR. GILCHRIST: I ask that this be marked for identification as Respondent's Exhibit E for identification.

THE COURT: Do you want to offer it in evidence?

MR. GILCHRIST: Yes, I think the witness will readily agree that this is the one he mailed.

THE COURT: Any objection?

MR. ESTABROOK: No.

THE COURT: It is received in evidence. What does it purport to be?

(Defendant Respondents' Exhibit E was received in evidence.)

xx

MR. GILCHRIST: Your Honor, Exhibit E is an original of a Mobil time tanker charter party form. There are seven pages to the form itself.

THE COURT: Where did it come from?

MR. GILCHRIST: Absent any rider.

THE COURT: Who is the author? What date is it and does it refer to the alleged charter party here in court?

Q Did you hear the Court's questions?

A Yes, I did.

Q Can you give us answers to those questions?

A Yes.

THE COURT: Have you ever seen this document before?

THE WITNESS: Yes.

THE COURT: What is it?

THE WITNESS: This is a working copy, we refer to it, of the charter party. It is typed up by our office, the terms as we have them, with copies sent to both principals, the charterer and the owner, for them to look at.

Assuming that they agree, then the final copy will be typed for signature.

THE COURT: That refers to the same charter party that you mention in your telex, does it?

THE WITNESS: Yes.

THE COURT: According to your understanding?

THE WITNESS: Yes, it does.

THE COURT: You sent this on Friday, the 19th, 1971 to whom?

THE WITNESS: I sent a copy to Mr. Theodoracopulos and a copy to Mr. Germano.

THE COURT: You kept a copy for your files, too?

THE WITNESS: That is correct.

I would have to check on March. I don't have the cover letter here.

Q Was there a cover letter?

A I believe there was a letter sent to both saying "This is a working copy."

THE COURT: What did you mean by working copy?

A For the principals to look at and make -- it is for the changes -- they would want to make sure what is in there and then we have the final typed up.

THE COURT: All right.

The question at issue here, as I understand, gentlemen, is whether or not there was in fact a contract made for the chartering of this ship as alleged in the pleadings here.

MR. ESTABROOK: That is right. We are claiming an arbitration clause on or about March 17th.

THE COURT: That is the issue in this case and I take it that is the only issue I am here to decide.

Do you agree that is the only issue in this case, Mr. Gilchrist?

MR. GILCHRIST: I think there are two issues, your Honor, at least.

THE COURT: When are they? Is that the first? Do you concede that that is one of the issues? Is that oneof the issues; yes or no?

MR. GILCHRIST: I prefer the Court of Appeals' formulation.

THE COURT: I hold then it is one of the issues.

MR. GILCHRIST: Whether there was a meeting of

the minds on all the essential terms.

THE COURT: On whether or not there was a contract created by the telex messengers. I hold that it's a matter of law, and I so rule. If you differ with me take your exception now.

MR. GILCHRIST: That is the issue.

THE COURT: That is one of the issues.

MR. GILCHRIST: Well, your Honor --

THE COURT: Either agree or take your exception. What do you do?

MR. GILCHRIST: I think I have to take an exception to the way it has been phrased, your Honor.

THE COURT: How would you phrase it?

MR. GILCHRIST: I would phrase it this way: I would say that the first issue in this case is whether in all of the conversations had between principals and the matters in writing exchanged between them there ever came there ever came into existence that meeting of the minds on all of the essential terms of the contract so as to result in an enforceable contract.

THE COURT: I will accept your phraseology. It is tantamount to what I said. I will accept it.

MR. GILCHRIST: The second issue in this case, your Honor, involves the role of National, because your

Honor could conceivably conclude that a fixture had to be done but that it is not binding on National and without trying to get into it, I think the evidence emerging on that is a separate issue in the case.

THE COURT: I accept that as a second issue.

Any objection, Mr. Estabrook?

MR. ESTABROOK: No.

THE COURT: And I would accept the two issues as stated by Mr. Gilchrist as being the only two issues before the court at this time on this trial.

Do you agree, Mr. Estabrook?

MR. ESTABROOK: Yes, your Honor.

THE COURT: Do you agree?

MR. GILCHRIST: I will accept that formulation.

THE COURT: At least we know where we are headed, what we have to decide.

Q Isn't it a fact that you and Mr. Germano spent some part of Thursday the 18th as well as Friday the 19th going over this Mobil form and filling in these blanks and making deletions so that you would have as a result a working copy to pass to the other party?

A That is correct.

Q You don't have any doubt that you mailed that on the 19th?

A I don't have my cover letter here, but if it wasn't the 19th it was the 18th or the 22nd, so we haven't missed by more than a day.

Q Do you also agree that on Wednesday the 24th, the following week, you sent over another Mobil time form?

A I believe it was the 25th.

Q Well, if I show you your covering letter would that refresh your recollection?

MR. GILCHRIST: Please mark this for identification as Defendant Respondent's Exhibit F.

(Defendant Respondent Exhibit F was marked for identification.)

xx

Q Showing you Respondent's Exhibit F, would you agree that you did send another charter of the Oswego Reliance to National on March 24th?

A That is correct.

Q Can you produce for us the charter that accompanied this letter?

A I don't have it with me.

THE COURT: Was that another copy of what you called the working copy?

THE WITNESS: I believe it was another copy of the one that was eventually signed on the 25th. I'm not positive of that. I don't have it here.

THE COURT: Signed by whom on the 25th?

THE WITNESS: Signed by Interocean.

THE COURT: So there were two working copies of a charter party that you prepared then?

THE WITNESS: That is correct.

THE COURT: Two separate copies?

THE WITNESS: That is correct.

THE COURT: One that you sent out on or about the 19th and one you sent out on the 25th?

A The 24th, I believe, your Honor.

THE COURT: Where is the other copy that you sent out on the 24th?

THE WITNESS: I don't have that copy.

THE COURT: Have you got it, Mr. Estabrook?

MR. ESTABROOK: I think the original one of the 24th, yes. This is the one that was sent to Mr. -- given to me by Mr. Gilchrist's office.

MR. GILCHRIST: Let me ask a question if I may, your Honor, here?

MR. ESTABROOK: Here we are.

Q The Poten files would you have for whatever was attached to your letter?

A I wouldn't know for certain.

MR. ESTABROOK: Just let me check this.

Here is a March 24th letter, copy from our files with a charter annexed to it. I also have a March 19th copy with a charter annexed to that. Here we are. These are Xerox copies that we got from Bethlehem.

THE COURT: Were there three working --

THE WITNESS: No, your Honor, there was one sent on the 19th, one on the 24th.

THE COURT: One sent on the 19th we have now marked in evidence.

THE WITNESS: That is Exhibit E?

MR. ESTABROOK: The one that was sent to us on the 24th, the original enclosure, has been marked by the defendants in evidence as D, I believe.

THE COURT: That is in evidence?

MR. ESTABROOK: Yes.

MR. GILCHRIST: That is one of the 25th.

MR. ESTABROOK: Sent to us on the 24th.

THE COURT: We have two working copies, one which was marked in evidence as Exhibit E and the other is marked Exhibit D, you say?

MR. GILCHRIST: D, your Honor, is the charter party enclosed with Mr. DeSalvo's letter of March 25th.

THE COURT: Both are now in evidence?

MR. ESTABROOK: Yes.

THE COURT: All right.

MR. GILCHRIST: E is the charter party sent over by Mr. De Salvo on Friday. Put in the mail by Mr. Salvo on Friday the 19th.

THE COURT: Those were the two working copies.

THE WITNESS: No, the one that was sent, your Honor, on the 24th.

THE COURT: Is marked D?

THE WITNESS: That is correct. That also was signed as the original by Bethlehem on the 25th.

THE COURT: E is the one that you had sent out?

THE WITNESS: On the 19th.

THE COURT: All right. They are both in evidence.

MR. GILCHRIST: If I may have the consent of counsel, can we put this one in evidence, the one that went out on the 24th?

THE COURT: We have that in evidence already.

MR. GILCHRIST: Not the 24th.

MR. ESTABROOK: Yes, it is the document that was sent on the 24th, was returned on the 25th. The original of this letter dated March 24th, Poten, was returned and is annexed to Exhibit D in evidence.

THE WITNESS: You got a copy of what was sent--

THE COURT: Let the witness do the testifying, please.

Take these two exhibits that you have before you now, Exhibit D and Exhibit E. Do those represent the only two working copies of this charter party that you prepared and sent to the parties?

THE WITNESS: Yes, your Honor.

THE COURT: What does D represent; what one in point of time?

THE WITNESS: Exhibit E is the first one that was prepared and mailed on the 19th as a working copy to both parties.

THE COURT: That was sent to whom, when you say both parties?

THE WITNESS: To Mr. Theodoracopulos and to Mr. Germano.

THE COURT: All right.

And the other one?

THE WITNESS: Exhibit D was sent, the original, and a duplicate original was sent to Bethlehem on the 24th. A copy was sent to Mr. Theodoracopulos on the 24th. On the 25th Exhibit D was given back signed by Interocean and subsequently hand delivered to Mr. Theodoracopulos.

THE COURT: Although it calls for the witness

to comment upon the contents of a written document, it would be helpful and it would be shorter if we would ask this witness to take Exhibit E, which he sent out on the date of March 19th, 1971, and compare it with the one that he sent out on March 24, 1971 and tell us what changes were made in the first copy by the second one.

MR. GILCHRIST: I am perfectly agreeable to that.

THE COURT: If you are perfectly agreeable, why not let him answer the question to save time. I want to know what the differences are; what changes he made, if any. You may cross examine if you want to as to why he made the changes. That is up to you.

THE WITNESS: Would you like me to relate the changes, your Honor?

THE COURT: Yes. What changes did you make in the first working copy of the charter that you sent out, that is Exhibit E, as I understand it, and the second one that you sent out, which is D?

THE WITNESS: Yes, sir. Clause 3A, under delivery. There was added "Or Red Sea at Charter's Option Provided No Extra Deviation Involved."

Clause 11B, which refers to drydocking. The additional wording was changed to read:

"Vessel requires drydocking fourth quarter 1971 for approximately 15 days. Charterers will give owners as much advance notice as possible so as to position the vessel in order to coordinate drydocking during this period."

Q That is changed from what?

A From the working copy, which was Exhibit E.

Would you like the wording that was in the working copy?

THE COURT: Yes. What was in the working copy?

THE WITNESS: Words in the working copy were: "Vessel requires drydocking November 1971. It is the intention of the owners to drydock the vessel in Portugal, Spain or Japan and charterer guarantees to place the vessel in position to drydock in any one of these countries."

Clause 38 is added to the charter and reads as follows:

"It is hereby agreed that the owner will register the vessel with tanker owners voluntary agreement concerning liability for oil pollution (TOVALOP) with all costs pertaining to such to be for owner's account."

Those were the changes that were made.

Q There is nothing about the guarantee there, is there?

A No, there is not.

Q In either charter party?

A No, there is not.

Q You agree that you sent copies of this charter party on Friday the 19th and again on Wednesday the 24th and Thursday the 25th. I ask you why you wouldn't have sent along a copy of this form of guarantee that you understood that Mr. Theodoracopulos or National was going to execute for you? Why didn't it go along with the charter party that you mailed on the 19th and why doesn't the charter party make any reference to the guarantee?

A I can't answer that.

Q Wasn't that one of the items in your alleged fixture letter?

A Yes, it was.

Q Was TOVALOP an item in your alleged fixture letter?

A No, it was not.

Q So you have to agree that the negotiations were not concluded on Wednesday; is that correct?

THE COURT: That is a conclusion that I won't permit him to answer.

MR. GILCHRIST: Pardon me?

THE COURT: That is for me to determine.

Q I ask you to look at the charter that you sent on the 19th. Is the language that you have there respecting drydocking in conformity with your fixture letter?

A The fixture letter does not spell out the wording. It just says "Suitable drydocking clause in November for 15 days." This clause refers to November; refers to drydocking.

Q Let me ask you something, Mr. De Salvo: Going back to Wednesday, now, and your phone conversations with Mr. Theodoracopulos before you sent this alleged fixture letter, had you told Mr. Theodoracopulos that this vessel would be required to drydock either in Portugal, Spain or Japan?

A I don't believe so.

Q How was he to know whether this would be suitable to him, to send his vessel maybe to Japan or maybe to Spain or maybe to Portugal at the height of the trading season because this clause had b een inserted in the charter?

A Well, he wouldn't know, but the clause was not inserted in the charter. It was a working copy of the charter. It is suggested wording by the owner. It doesn't mean that he agrees to it.

Q This charter party thatyou put in the mail on Friday, the 19th, was a suggested copy of the charter to be

agreed upon; correct?

A It is a working copy of the charter.

Q A suggested or proposed charter to be agreed upon; correct?

A Fine.

Q When did you get to telling Mr. Theodoracopulos about the situation of Spain, Portugal and Japan?

A I would have to surmise. I don't know the exact time.

Q By the time you sent out this letter, wasn't it pretty near the close of the day on Wednesday?

A Yes, it was.

Q Would you agree that it came in on National's telex at 5:36 p.m.? Does that sound reasonable?

A It sounds about right.

Q So when was the next conversation that you had with Mr. Theodoracopulos after sending this?

A Thursday.

Q Thursday morning?

A Thursday morning.

Q Do you remember who called whom?

A I believe I called him.

Q Do you remember the hour?

A No, I don't.

Q Was it early in the morning, mid morning?

A I would guess it was more like 10 o'clock, 10 o'clock or so.

Q And your recollection is that you called him?

A It is my recollection.

Q Do you remember what you said to him and what he said to you?

A No, I do not.

Q You have no recollection at all?

A I believe I probably asked to make sure he got the Telex but other than that I don't believe I remember.

Q You don't remember what he said to you either?

A No, I don't.

Q Do you have any recollection of his being kind of angry with you?

A No.

Q Do you have any recollection whatsoever of his saying to you "Where did you get this stuff, we'd got a fixture," or words to that effect?

A Not at all.

Q What didyou discuss on that Thursday morning call?

A We discussed that charter, what he wanted to do with the vessel. I discussed the market in general with all the principals usually at least once or twice a day.

Q How many phone calls did you have Thursday morning with Mr. Theodoracopulos; do you remember?

A No, I don't.

Q Did you have more than one?

A I don't know.

Q Did you say anything about Spain, Portugal or Japan as being necessary to Bethlehem for drydocking of this vessel on that day?

A I don't remember what day I brought it up with him.

Q If I suggest to you that in one conversation that you had with Mr. Theodoracopulos on Thursday, the 18th in the course of discussing the problem that TOVALOP was going to create that you said to Mr. Theodoracopulos you might be able to do something about that but that this suggestion with respect to the drydock was something that you knew about personally because Bethlehem had contract arrangements in Iberia, meaning Spain and Portugal, and also in Japan with respect to the drydocking of its vessels; do you remember saying that?

A Not at all.

Q Did you know that to be so?

A Not at all.

Q When did it come to your attention that this was

going to be the language that you sent over in the working copy?

A Mr. Germano gave it to me either on the 18th or the 19th.

Q But you didn't know of these contract arrangements that Bethlehem had in Spain, Portugal and Japan before that?

A No.

Q You had no personal knowledge of them from your previous dealings at all?

A I still don't know tha they have that.

Q And you don't remember having any discussion on Thursday with Mr. Theodoracopulos to that effect?

A No.

Q That was going to pose a problem?

A No.

Q And you have no recollection that Mr. Theodoracopulos was angry with you about sending him a so-called fixture letter and saying that you had a fixture when there were still so many matters open?

A No, I do not.

Q He didn't take any offense with you on Thursday the 18th whatever?

A Not that I recall.

Q Tell me what the gist of what passed between you

and Mr. Theodoracopulos was on Thursday the 18th?

A I am not sure whether it would be Thursday the 18th or Friday the 19th, but as various orders came out in the market they were given to him. We discussed I believe whenever Mr. Germano gave me the language that he wanted here, that was also discussed on the phone with Mr. Theodoracopulos.

Q What language would that be now?

A The drydocking language, that clause that you have referred to.

Q You refer in your statement, I think, Mr. De Salvo, to the fact that you went to National several times on the drydock clause before you get National to give you language of their own; is that correct?

A That is correct.

Q And the language of their own, I take it, is your understanding -- let me rephrase that: That your understanding of the language they wanted is what is in the charter party sent on March 25th?

A That is correct.

Q But that prior to receiving language of that description from them you had been to National discussing the language that Bethlehem wanted in?

A That is correct.

Q The drydocking clause?

A That is correct.

Q So you believe that that could have happened either Thursday or Friday because of your discussions with Mr. Germano in getting this working copy of the charter party prepared?

A Right.

Q Your testimony has been, I think, that on Thursday the 18th you said you made an offer of the vessel to Chevron; is that correct?

A That is correct. I don't recall whether itwas the 18th or the 19th.

Q How could you make an offer of this vessel?

A On the authority of Mr. Theodoracopulos.

Q Did Mr. Theodoracopulos authorize you to make an offer to Chevron of the Oswego Reliance on Thursday, March 18?

A Thursday or Friday, yes, he did.

Q In what words did he authorize you to do that; do you remember?

A I wouldn't know the exact wording, no.

Q You don't seem to remember any longer which day it was.

A Well, it is two years ago. There has been a lot of offers and ships in the meantime.

Q You put all this time memorialized in the statement that you made on April 6, 1971?

A I believe in the statement even on April 6 I wasn't sure which day it was. I would have to read through the statement, but I believe that was the case.

Q Were you the person that talked to Chevron?

A No, I was not.

Q Was it someone else in the Poten office?

A I believe it was somebody else.

Q Do you know what that other person in the Poten office said to Chevron? Were you present when the phone call was made?

A I was in the office but I wasn't on an extension phone.

Q Pardon?

A I say I was in the office but I was not on an extension phone.

Q Then how do you know what this other person said to Chevron?

A We usually operate in a proper manner in the fixed -- offers of ships. When I give somebody in the office an offer of one of the principals they usually do so.

Q At what rate was this offer made?

A I don't recall. As I said earlier, I believe it was around world scale 160.

Q Isn't it more likely, Mr. DeSalvo, that knowing there were so many matters still open between Interocean and National and Hellenic that you put out a feeler to sound out Chevron to find out whether they would have any interest in tonnage of this sort?

A We talk tonnage all the time, but I can't offer a vessel without a principal's authority.

Q And you say you had Mr. Theodoracopulos' authority to make a firm offer of the Oswego Reliance to Chevron either on the 18 or 19; is that your testimony?

A As far as I was concerned, I did.

THE COURT: Was that word voyage charter?

THE WITNESS: Yes.

THE COURT: Didn't you testify on direct that you discussed the price of the voyage charter with Theodoracopulos?

A No, sir. We made an offer and the problem was they would not consider the offer because the vessel was not a member of TOVALOP.

THE COURT: I didn't ask you that.

Did Theodoracopulos give you a price at which you could

offer this ship?

THE WITNESS: Yes, sir, your Honor.

THE COURT: And you gave us this price?

THE WITNESS: Yes. That is what I am saying. To my recollection it was world scale 160.

THE COURT: What do you mean by world scale 160?

THE WITNESS: There is an organization that works up basic freight rates between the ports and this basic rate is called world scale 100 and the market negotiates around that base.

THE COURT: Had that sub charter been given Chevron would it have represented a profit to Hellenic or to the charterer?

THE WITNESS: I don't recall. I think this particular charter equated to maybe 140, 150, so there would have been perhaps some profit, but the offer rate is not necessarily the fixing rate.

THE COURT: When you spoke to him about this, did he make any comment to the effect that the ship was not for sub charter?

THE WITNESS: Mr. Theodoracopulos?

THE COURT: Yes.

THE WITNESS: No, sir, he offered the ship to me for sub charter.

THE COURT: All right.

Q You can't recall what he said to you to give you this authority you say you had?

A I wouldn't recall the words. The order had been given to him that Chevron was open for a vessel of this class for a voyage probably, knowing them, for eastward options including South Africa.

He said fine. Since we had all of the details right in front of us, the vessel was offered for sub charter at world scale 160.

Q You don't know what it was that was actually said by whomever else Poten made this call to Chevron, do you?

A I presume he called Chevron and said "We have a firm offer for you."

Q I don't want what you presumed. You didn't hear it, did you?

A No, I did not.

Q Is this the first time TOVALOP had come up on this occasion?

A On this vessel, yes.

Q And you are not sure whether this was the 18th or the 19th?

A No, I'm not.

Q What did you do when this matter of TOVALOP came up?

THE COURT: Show it to Mr. Gilchrist and mark it

A I called Mr. Theodoracopulos and told him that Chevron would not accept an offer of the vessel unless she was entered in TOVALOP.

Q Didn't you also say that no major would accept a vessel without TOVALOP entry?

A No, I said it was becoming a situation where more and more of the majors were requiring that the vessel be entered in TOVALOP.

THE COURT: What did he say to you when you told him Chevron wouldn't take it unless it was entered in TOVALOP.

THE WITNESS: We didn't know whether the vessel was entered in TOVALOP. I called Mr. Germano and found out that the vessel was not entered in TOVALOP; that Bethlehem was a self-insurer.

Q Let me ask you something: If it had developed that Bethlehem was unwilling to enter TOVALOP would you have considered that there was still a binding fixture between these two parties?

A I would say yes. That was a transitionary period when some charters were done with and some without. Subsequently once that had been done charterers went back and more or less told the owners that they had to enter and this was done in some cases.

Q Well, now, this was not an item that was covered in the alleged fixture letter?

A That is correct.

Q In fact, if this fixture is subject to a Mobil time form then it is subject to Clause 23 of the Mobil time form, is it not? It is subject to all your regular standard provisions of the Mobil time form, is it not, unless something different has been agreed in the so-called fixture letter?

A Or in the sub details.

Q Would you take a look at clause 23?

THE COURT: I think we have been over that. I think we have been all over that.

MR. GILCHRIST: I want to put that earlier testimony, which was out of context, into a certain context.

THE COURT: I thought you had done it, but go ahead.

Q That is a provision that the owner will enter into a Protection and Indemnity Club, is it not?

A That is correct.

Q Do you consider that when a fixture is allegedly made subsequent to the Mobil time form that you can strike the insurance provision without letting anybody know?

MR. ESTABROOK: I object to the form of the question. That is not correct in accordance with the charter. I suggest you look at Clause No. 12.

THE COURT: Objection sustained.

Next question.

A It is my understanding --

THE COURT: He is going to answer it anyway. Go ahead.

THE WITNESS: You don't want me to answer?

THE COURT: You can answer it. Put it on the record, even though I am not going to pay attention to it.

THE WITNESS: My understanding, as I said earlier, is that one of the sub details are the things that are not technically correct in the charter which have to be xed out such as whether it is a motor vessel or a turbine vessel. In this case Bethlehem Steel was self-insured so that they could not be entered into a protection and indemnity association.

Q That is not one of the clauses that is excluded in the reference in the fixture letter?

A No.

THE COURT: Your question now is argumentative and I think we have been over that three times.

Q Do you know why the charter party chose National as the agent of Hellenic?

A You mean in the signature provision?

Q On the last page.

A The charterer puts in where he wants notice to be sent and the owner puts in where he wants notice to be sent and the owner puts in where he wants. We just put in what we are told to put in.

Q I thought it was your understanding that National was going to be the guarantor of this charter party.

A That is my understanding. If you are referring to Clause 35, that clause is strictly for notices, as to where legal notices are to be sent.

Q When on Wednesday, March 17 you started out to see if this business could be put together for the Oswego Reliance, did you consider that National and/or Hellenic had made you their agent to consummate a fixture?

A No.

Q You just thought of yourself as a broker, a go-between; is that correct?

A That is correct.

Q With two principals and one broker?

A That is correct.

Q Passing the offers and the counter back and forth

between the parties and hopefully they would get together and you would earn your commission and a piece of business would be fixed?

A That is correct.

Q So that you didn't consider yourself National's agent?

MR. ESTABROOK: I object to that. That is a question of law.

THE COURT: He can testify as to whether he felt he was the agent. The objection is overruled.

A No, I did not.

Q Or Hellenic's agent?

A Or Bethlehem's agent.

Q Or Mr. Theodoracopulos' agent?

A That is correct.

Q Or Mr. Spears' agent?

A That is correct.

THE COURT: He so testified before in this same way. He was a broker acting for both sides and hoping to collect from the owner.

Q Had you read the Petitioner's trial memorandum?

A No, I had not.

MR. GILCHRIST: Maybe I can save some of our time, your Honor. The Petitioner is making a claim based

on agency here.

THE COURT: I didn't know that he was. I thought that the theory of the case was that the company or the broker had an agreement by Telex which was confirmed by both parties and that the Telex was a memorialization of the contract.

MR. ESTABROOK: Yes, our position is that the broker was the only one who forwarded information by the parties.

THE COURT: He created a memorial. He acted as the broker for both parties and the negotiator, the contact man through which both of them communicated.

MR. ESTABROOK: That is right.

THE COURT: That was all gone into this morning, I think, or this afternoon.

MR. GILCHRIST: I would like to know from counsel whether in light of our earlier colloquy about what we agreed to be the two issues in the case he is abandoning this theory that is put forward at pages 16 and following that National gave Mr. DeSalvo the status of an agent for it.

THE COURT: There is no claim on that as I understand his case.

MR. ESTABROOK : My claim is, your Honor, that

National gave Mr. DeSalvo as a broker instructions to Telex or communicate with Bethlehem as to their position in this case.

THE COURT: As a means of communication in order to create a memorial.

MR. ESTABROOK: And consequently a Telex signed by Mr. DeSalvo is sufficient to bind National as far as this is concerned because they gave him the information and it was his job to pass it on to Bethlehem.

THE COURT: I would rule that it wasn't until it was accepted by both parties, but there appears to be confirmation here of an acceptance from the Telex itself.

MR. ESTABROOK: Yes.

THE COURT: The only question I see in this case is whether or not ultimately there was a contract made by these Telex records.

MR. ESTABROOK: That is right.

THE COURT: Or whether or not, as Judge Timbers' says, it conforms with the law of contracts and spells out sufficient details to make the contract definite and certain so that it can be enforced.

MR. GILCHRIST: Your Honor --

THE COURT: We won't argue about it now.

There is no claim here that he was the agent of

anybody.

It is now a quarter to four. We will take a recess to 11 o'clock tomorrow morning, right after I get through with my motion calendar. I suggest you do what I suggested to you so we can get this case moving along.

How long do you expect to be further with this witness?

MR. GILCHRIST: I am 95 per cent complete with cross examination.

THE COURT: All right. How many more witnesses have you got to call, Mr. Estabrook?

MR. ESTABROOK: I have three, your Honor.

THE COURT: Who are they?

MR. ESTABROOK: Mr. Kelley --

THE COURT: Who is Mr. Kelley?

MR. ESTABROOK: He is the lawyer. I am going to call him as an officer of Interocean to testify as to self-insurance.

I have two witnesses as to the drydocking clause, Mr. Gorrisen and Mr. Proeller.

THE COURT: What are they going to be experts about?

MR. ESTABROOK: On the fact that the drydocking clause is a relatively minor matter to be worked out in view

of the subsequent employment of the ship.

THE COURT: It has to be done between voyages; is that what you mean?

MR. ESTABROOK: That is right, and at a convenient port.

THE COURT: That is a matter of negotiation and a matter of the words that the ship is engaged on. You don't expect him to drydock with a cargo of oil in it.

MR. ESTABROOK: That is right.

THE COURT: That is your case, then?

MR. EATABROOK: That will be my case.

THE COURT: How many more witnesses do you have, Mr. Gilchrist? I am not trying to rush you. I am trying to get an idea of this case.

MR. GILCHRIST: I will have three witnesses in addition to Mr. Porvancher, Mr. Theodoracopulos and Mr. Spears, who were actually in the negotiations with Mr. DeSalvo and one expert as to this drydocking and other matters.

THE COURT: All right. The reason I asked you that is because on Monday I have to go into the administrative part and I explained that to you. If I don't get through on Friday I will have to set this down for some subsequent date. That is why I took this case,

because it is a non-jury case. I will accomodate counsel.

MR. GILCHRIST: I don't have any difficulty seeing us finishing by Friday.

THE COURT: All right, I will give you time for briefs and then time for reply. Thank you very much for your cooperation.

(Trial adjourned until 11:00 a.m., April 26, 1973.)

mcsg

INTEROCEAN SHIPPING CO.,

Petitioner,

vs. 71 Civ. 3363

NATIONAL SHIPPING & TRADING CORP., et al.,

Respondents.

April 26, 1973

(Trial resumed.)

F R A N C I S E. D E S A L V O, having been previously duly sworn, testified further as follows:

CROSS EXAMINATION (CONTINUED)

BY MR. GILCHRIST:

THE COURT: The oath was administered to you yesterday and you are still under oath, sir.

THE WITNESS: Yes.

THE COURT: Gentlemen, I am going to have to leave you about 3 o'clock today. I have a hearing upstairs. We will sit until 3. Maybe we can have a shorter lunch period.

You said you were about 95 per cent through.

MR. GILCHRIST: When I got back to the office I realized I may have misstated myself.

THE COURT: All right, you make your record. If we can't finish today we will have to arrange for some further time.

MR. GILCHRIST: I am very doubtful that we will finish today now in light of what your Honor said.

THE CLERK: May I remind you you are still under oath, sir.

Q Mr. DeSalvo, did you find that Persian Commander Charter Party?

A Yes, I did.

Q And you brought it with you?

A Yes, I have.

THE COURT: Do you want to have this marked?

MR. GILCHRIST: Do you want to offer it?

MR. ESTABROOK: I will offer it if you don't.

THE COURT: What is this paper now that the witness has.

MR. GILCHRIST: If your Honor recalls, toward the close of my cross examination yesterday afternoon I asked the witness about the guarantee that he said was one of the essential terms of this charter.

THE COURT: Yes.

MR. GILCHRIST: And he said that he had in mind a prior form of guarantee which had been executed in connection

with the charter of the Persian Commander. I asked him if he would bring that charter with him today. I am perfectly willing to offer it if Mr. Estabrook doesn't wish to.

THE COURT: It is not between the same parties, is it?

MR. GILCHRIST: Your Honor, it is a charter party entered into between Hellenic International Shipping, S.A., one of the respondents in this case and the owner of the Persian Commander, a firm styled Persian Gulf Tanker Company, Ltd. This will be G for identification.

THE COURT: Mr. Estabrook says he has no objection to having it received in evidence so we will receive it right in evidence.

Do you offer it in evidence?

MR. GILCHRIST: Yes.

THE COURT: All right, received in evidence by consent.

(Defendant Respondent's Exhibit G received in evidence.)

xxx

Q Would you agree with me, Mr. DeSalvo, that what has been marked as G in evidence consists of the printed pages of the Mobil time form, being, I believe, seven in number plus one page with a rider, Clause 3?

A In addition, a page of added clauses 38 through 43.

Q Correct.

A Yes, sir.

Q Is there a guarantee which forms a part of that charter party?

A No, sir, there is not. It is not connected to this charter.

THE COURT: Was there a guarantee?

THE WITNESS: Yes, your Honor.

THE COURT: Was it a separate document?

THE WITNESS: Yes, sir.

THE COURT: Where is that?

THE WITNESS: I don't have the signed copy. I have a copy of the letter from National Shipping and Trading forwarding the form to us and a copy of the form. I called the owner's office this morning to get a copy of the original. He is out. It is not in their charter party file. It is in their financial file.

THE COURT: Do you have a copy of the guarantee concerning the charter party which has just been marked in evidence?

THE WITNESS: That is correct.

THE COURT: Have you got that here?

THE WITNESS: YEs, sir.

A He didn't ask for one.

THE COURT: Show it to Mr. Gilchrist and mark it Defendant Respondent's Exhibit H for identification.

(Defendant Respondent's Exhibit H marked for identification.)

Q Do you want to offer this in evidence?

MR. GILCHRIST: I think that is Mr. Estabrook's burden.

THE COURT: I asked for this guarantee.

MR. GILCHRIST: I don't think it makes that much moment whose exhibit it is.

MR. ESTABROOK: I will offer it.

THE COURT: You got it marked Exhibit H for identification.

Do you object to it being in evidence?

MR. ESTABROOK: No.

THE COURT: Do you object to it?

MR. GILCHRIST: No.

THE COURT: It is the form of guarantee which was used in Defendant's Exhibit G and consists of three pages. One of them is a form of guarantee.

(Defendant Respondent's Exhibit H received in evidence.)

xxx

Q With reference to Exhibit G, the charter party, was that a charter that was negotiated through the Poten

office?

A Yes, it was.

Q Did you handle the negotiations?

A I handled part of the negotiations.

Q And somebody else also was involved in the Poten office?

A That is correct.

Q Who would that be?

A Mr. Harrison.

Q But you are familiar with that charter party?

A That is correct.

Q And what the negotiations were that led up to it?

A That is right.

Q What part did Exhibit H play in connection with this charter?

THE WITNESS: I think that is immaterial. I don't see how it is relevant at all.

Q What was the purpose of this guarantee, Mr. DeSalvo?

A The purpose . the guarantee was for financing purposes for the owner, to make sure that Hellenic had the backing so that they could bank the charter party.

Q What was the purpose of the guarantee that was

requested in connection with the Oswego Reliance?

A I believe to determine that -- Hellenic International Shipping the owners were not familiar with. Mr. Theodoracopulos, they were. So they asked for a guarantee from him to back Hellenic.

Q From National or from Mr. Harry Theodoracopulos?

A From National.

Q This form of guarantee, which you agree is unexecuted here -- right?

A That is correct.

Q Is not a guarantee of Mr. Harry Theodoracopulos, is it?

A No, it is a guarantee of his father, I believe.

Q His father being John Theodoracopulos?

A That is correct.

Q The name that is on this form?

A That is correct.

Q If I heard you correctly you said that you had in mind a form of guarantee which had been given before and that was the one that was used with the Persian Commander?

A That is correct.

Q So this is the one you were talking about in your testimony yesterday afternoon?

A That is correct.

Q And in fact Exhibit 7, I believe it is your testimony, was prepared in your office?

A That is correct.

Q Is it identical with it?

A It is identical with the changes for the dates and the names of the parties involved.

Q Is it possible, Mr. DeSalvo, that in thinking of the Oswego Reliance guarantee you could have had in mind not the Persian Commander but a charter party that was done through your office in 1969 with Grand Bassett Tankers Incorporated?

MR. ESTABROOK: I object on the ground that anything is possible.

THE COURT: Objection sustained.

MR. GILCHRIST: Your Honor, I don't want to trap this witness. I want to give him a chance to see if he can refresh his recollection.

THE COURT: I know, but we are getting into a collateral matter here. I am not concerned with other charter parties. We can't confuse this case with other charter parties. I have permitted you to inquire on cross examination as to the form of the guarantee which was used in the case on trial. The witness said that he copied a form which had been in prior use by his office. He has produced it. You asked him to produce it and he has produced it. You have it here. I think that should end that matter. We are not going to try a number of other charter parties which have nothing to do with this case at all.

We have a very narrow issue here, the issues that you pointed out yesterday. Next question. Go on to something else.

Q Are you content to let the matter rest there, Mr. DeSalvo?

THE COURT: I'm ruling, not him, and I am making

the rulings here. The rulings are in evidence and I will give you an exception to my ruling.

MR. GILCHRIST: I respectfully except.

THE COURT: You don't have to take an exception. The law gives you that exception.

Q Going back to Wednesday, March 17, Mr. DeSalvo, in the phone conversations that you had with Mr. Harry Theodoracopulos did you tell him that some form of guarantee would be required by Interocean prior to sending off your fixture Telexes?

A Yes, I did.

Q Can you remember what you said on that point and what he said to you?

A No, I don't.

Q Did you tell him what the form would be?

A No, I don't believe so.

Q You didn't give him any language of the form?

A No, I did not.

Q So that was an item that would have to be agreed upon after you had passed some form of guarantee to him to study; is that correct?

A That would be true.

Q Did he say to you without any reservation or unconditionally that he or National would execute any form

of guarantee which you sent over to him?

A No, not unconditionally.

Q Isn't it a fact that you said that you had a form in mind and that you would send it over for him to examine?

A I don't recall if I said that or not.

Q If I show you Petitioner's Exhibit 1, do you find any note with respect to the guarantee on that in your contemporaneous notes made that day?

THE WITNESS: Didn't we go over this yesterday?

MR. GILCHRIST: On this point?

THE COURT: I think you did. He said no.

THE WITNESS: It is the last page, bottom right-hand corner.

Q What does it say?

A "Letter of Guarantee."

THE COURT: That is down in the red ink?

THE WITNESS: That is correct.

THE COURT: But not in black ink?

THE WITNESS: That is correct.

Q You didn't tell him what the form of the guarantee would be, what kind of a guarantee it would be or what the language of the guarantee would be, did you?

A I didn't discuss the language. I didn't discuss the form. As to whose guarantee it would be, I think we

discussed that it would be his or National Shipping.

Q Wouldn't you agree that the substance of your conversation with him on this point was that you would send him what Interocean desired so that he could study it to decide whether it would be acceptable?

A He had agreed to the principle of a letter of guarantee. The wording or the format had not been discussed.

Q Whose guarantee was that going to be?

A It was going to be a guarantee that was satisfactory to Interocean.

Q How did you describe it when you sent out the fixture letter?

THE WITNESS: The fixture letter speaks for itself. It says "With appropriate guarantee."

MR. GILCHRIST: Of National.

THE COURT: It doesn't say National or anything else.

MR. GILCHRIST: Yes, it does.

THE COURT: Not that I have. It says "With appropriate letter of guarantee."

It doesn't say National.

MR. GILCHRIST: Your Honor, it reads: "Charterer Hellenic International Inc., S.A. of Panama." --

THE COURT: I can read it as well as you,

counsellor. It describes Hellenic as being a subsidiary of National Shipping and Trading and the next lines says "With appropriate letter of guarantee," period.

MR. GILCHRIST: I don't want to be argumentative --

THE COURT: The document speaks for itself.

MR. GILCHRIST: It is National that has been joined as a respondent by the Petitioner in this action, not Harry Theodoracopulos.

Q Going back to the alleged fixture letter, Mr. DeSalvo, is it your position -- I am showing you Petitioner's Exhibit 2 -- as the broker on this alleged fixture that this exhibit contains all the essential terms of the charter party to be entered into between the parties to this proceeding?

MR. ESTABROOK: I object to that.

THE COURT: The objection is sustained. We are not concerned with what his contention is. You have an exception to my ruling.

Q Would you agree with me, Mr. DeSalvo, that an appropriate letter of guarantee was an essential term of this business?

THE COURT: It calls for a conclusion on the part of this witness.

MR. ESTABROOK: I will object to that.

THE COURT: Objection sustained.

MR. GILCHRIST: Your Honor, his testimony is that --

THE COURT: I don't want arguments on my rulings on evidence. You have an exception given to you by law.

Q I would like to ask you once more, Mr. DeSalvo, why if this was a term you never sent forward to National or to Hellenic or to Mr. Harry Theodoracopulos the form of guarantee which was supposed to be part of this deal?

A It wasn't sent at the time. I can't give you any particular reason why it wasn't.

Q Wasn't that just as important as the charter party form itself with all the additions and deletions which were made to it?

THE COURT: The form of your question is objectionable.

MR. ESTABROOK: I object to it. It is very clear the witness has testified that --

THE COURT: We will leave it. Let him answer.

Did you feel that that was important, that you should set forth in your Telex communication the wording of the letter of guarantee or some reference as to its actual contents and some notation as to by whom it should be

signed and executed?

THE WITNESS: No, your Honor.

Q This guarantee had been requested by Mr. Germano, had it not?

A That is correct.

Q How could you have a completed transaction without the execution of some form of guarantee?

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THE COURT: Objection sustained, argumentative.

MR. GILCHRIST: I think this is proper cross examination.

THE COURT: I rule it is not. The form of your question is improper. You have an exception to my ruling. The next question.

Q I assure you Respondent's Exhibit E, Mr. DeSalvo, which is the Mobil time form that you mailed to National on Friday the 19th, and I ask you to go through that and tell me which of the additions and deletions which appear there had been discussed with you or by you and Mr. Theodoracopulos on Wednesday the 17 prior to your sending the alleged fixture note?

A Let me understand. You want me to say which things were not discussed or were discussed?

Q Either way.

THE COURT: Didn't he do that yesterday afternoon?

MR. GILCHRIST: No, he didn't, your Honor, not interms of what was discussed with Mr. Theodoracopulos before sending the fixture letter.

THE COURT: My recollection is that he went over this with you. He pointed out each one of the changes and you questioned him concerning each one of the changes.

MR. GILCHRIST: I don't have that transcript, but I don't believe we covered everything.

THE COURT: Do it again then. You want to cover something that you feel you didn't cover yesterday concerning a change in the Mobil form. Question him about it.

Q Had you discussed with Mr. Theodoracopulos this deletion about seven lines up from the bottom of page 1?

THE COURT: Give the number.

A Clause 1C.

Probably not the exact words as I would recall but --

THE COURT: What does 1C read?

THE WITNESS: What was deleted were the words "After having been drydocked and painted at owner's expense."

Since the drydocking was discussed as to when it was going to be in this charter as of November, we had

discussed that the ship would not be drydocked and painted prior to delivery.

Q Had you discussed this addition in the margin of page 2 about moderate weather being defined as maximum Beaufort Scale 5?

A I don't recall.

Q Had you discussed the deletion on page 3 of sub-paragraph D of Clause 5, the off-hire provision?

A I don't know. I have no notes to that effect.

Q I think you agree with me, Mr. DeSalvo, that on Wednesday the 17th you had not mentioned to Mr. Theodoracopulos anything about drydocking at Portugal, Spain and Japan?

A That is correct, as best -- my notes show -- no, we did not discuss Portugal, Spain and Japan.

Q Did you discuss with Mr. Theodoracopulos prior to sending off the alleged fixture letter the deletion at Clause 17?

A I don't believe so.

Q How about Clause 16?

A No, I don't believe so.

Q Do you agree there is a deletion at Clause 16?

A Yes, I do.

Q Had you discussed with Mr. Theodoracopulos the

deletion of Clause 23?

A No, I had not.

Q While I'm there, Mr. DeSalvo, had you informed Mr. Theodoracopulos on Wednesday the 17th that Interocean was a self-insurer?

A I don't recall. I don't believe so.

Q Did you know on the 17th, if you can remember, whether Interocean was a self-insurer?

A I don't believe I did.

Q You didn't find that out until you talked with Mr. Germano on the following day, on Thursday?

A I believe it was on Thursday, either Thursday or Friday.

Q Mr. DeSalvo, there is an address commission in this charter, is there not?

A It could be termed that. It could be termed an in-hand brokerage commission.

I don't know what the proper phrase is in this case.

Q Who got that?

A I believe Steamship Service Corporation, which is a wholly-owned subsidiary of Bethlehem Steel.

Q Why was there no address commission for the charterer?

A He didn't ask for one.

Q There came a time on Thursday the 18th, I believe, Mr. DeSalvo, according to your testimony and your statement made back in April of 1971, and I don't want to play with semantics on this, when someone at Poten went out to Chevron with respect to the Oswego Reliance; is that correct?

A That is correct.

Q At that time did you know what the actual language of the drydock clause was going to be?

A No.

Q Well then, you will have to agree that you couldn't have made a firm deal with Chevron on the 18 without knowing what that language was going to be.

A I act on behalf of the principal giving me a firm offer. If he offers me the ship firm then I presume he thinks he is going to reach agreement on a drydock.

Q You agree that is a presumption, don't you?

A Yes, I do.

Q Isn't it a fact that after Mr. Theodoracopulos told you that this Spain, Portugal, Japan drydocking clause was unacceptable you nevertheless sent forward this exhibit including that language?

A I am not sure when he was told -- we were talking

about it -- whether it had already been in the mail or not.

Q You agree you mailed this on Friday the 19?

A That is correct.

Q And you had discussions with Mr. Theodoracopulos on Thursday the 18 about the Spain, Portugal, Japan drydocking?

A I'm not sure. If it was Thursday the 18th we discussed Spain it would be, but I don't --

Q It could be; you will agree that it could be.

A It could have been.

Q You are not prepared to state categorically that it couldn't have been that you discussed Spain and Portugal that Thursday, the 18th?

MR. ESTABROOK: I object. Anything is possible.

THE COURT: Already answered.

Q By the way, why did you send the charter by mail on a Friday knowing that it wouldn't get there until Monday?

A Standard procedure.

Q Well, on the 25th, you sent it over by hand?

A Obviously by the 25th there were some problems.

Q There were no problems on the 19th?

A Not as far as sending the working copy. It is fairly standard to have still some clauses that are under discussion when you send a --

Q You agree that there were clauses under discussion on Friday the 19th then?

A Yes, there were.

Q The fact of the matter is, isn't it, that on Friday the 19th neither party knew exactly what they would be signing, if they were going to sign anything?

A That is correct.

Q Turning to your statement, Mr. DeSalvo -- do you have that there?

A Yes, I do.

Q I refer you to the last few lines at the bottom of page 31 and going over to page 32 where you make reference to "typing up the proforma charter party which was sent out on the 19th along with other details."

Have you read that?

A Yes, I have.

Q What did you have in mind back in April of 1971 when you said "along with other details"?

A Other things that were typed into the charter party, the proforma.

Q That is in the charter party, isn't it?

A The drydocking clause, you are referring to?

Q It is your language, Mr. DeSalvo, not mine. Do you want to read it again?

A I know what I said here. I don't quite understand your question.

Q Your answer to counsel on that day when this follows. He said to you:

"Did you have Interocean's drydocking clause on the 18th?"

A Correct.

Q And you answered :

"I do not recall whether we got it during the 18th or early 19th, but at that time or just in time to type up the proforma charter party which was sent out on the 19th along with other details."

I am trying to find out what you meant back in April of 1971 when you said "along with other details."

A The other details that were used to type up the proforma charter party.

Q You didn't mean something in addition to the charter party?

A No, I did not.

Q Such as a letter of guarantee, for example?

A No, I did not.

Q I would like to direct your attention now, Mr. DeSalvo, to page 42 of this statement and in particular to line 16. Can you tell us what you were

stating at lines 16 through 21?

A I was referring to the wording of a drydocking clause given me by Mr. Spears.

Q What are you quoting from?

A My notes.

Q Is that Petitioner's Exhibit 1 which you have there?

A Yes, it is. It is the bottom part in the blue ink below the last line starting here (indicating).

Q This is Petitioner's 1, the second page. Is that what you were reading and quoting from page 42 of your statement?

A That is correct.

Q This is somewhat abbreviated, would you say?

A Yes, maybe a little difficult to read, yes.

Q I find it impossible, but I ask you now to look at the charter party executed by Mr. Kerr on behalf of Interocean and I ask you whether the typed-in language that is contained as an addition to Clause 11B of that charter is the same as the language that you were quoting at page 42 of the statement?

A No, it is not.

Q You do agree, do you not, that at some point in the week commencing Monday the 22 and, to be more precise,

on the afternoon of Tuesday the 23, after Mr. Theodoracopulos left on his vacation, you had one or more phone discussions with Mr. Spears?

A Correct.

Q And, in substance, you said to Mr. Spears -- correct me if I misstate this, Mr. DeSalvo, because I don't want to twist it -- you said, in substance, "We are getting nowhere on this drydock clause. Can't you give me the language that you want"?

A I would say those were additionally my words.

Q And it was in response to that statement that Mr. Spears read you what you put on Petitioner's 1 and which you were quoting at page 42 of your statement back in April of 1971?

A That is correct.

Q Now, I ask you if you can explain to us why the language of the charter party sent over on March 25 is so different from that which you have quoted at page 24?

A I really don't recall.

Q Did you go back to Mr. Germano and did Mr. Germano require changes in what Mr. Spears had given to you?

A I never passed Mr. Spears last clause to Mr. Germano?

Q Why not?

A Because on Tuesday evening Mr. Germano was out of the office by the time I got to the clause from Mr. Spears and Wednesday morning Mr. Spears asked me not to pass it.

Q Didn't you testify yesterday that when Mr. Spears called you Wednesday morning his first impression to you was "Have you passed that to Mr. Germano?"

And you said, "No, I haven't been able to get him"?

A "I didn't get him last night," and he said "Don't pass it to him," and I did not.

Q When you sent D over Mr. Germano had never seen that language of Mr. Spears?

A I don't believe he did.

Q You do agree, don't you, Mr. DeSalvo, that as a broker and particularly when you are acting for both parties to a prospective deal you have a rather high obligation to transmit the requests and counter-requests the proposals and counter-proposals of both parties to each other?

A That is correct.

Q And to do so accurately?

A That is correct.

Q One of the things that Mr. Theodoracopulos asked for on Wednesday when you were exchanging counters between

these parties was a six-month review; is that correct?

A That is correct.

Q Did that provision get into Exhibit E?

A Yes, it did.

Q Would you show me where it got in?

A Clause D.

Q That is one of the places where there is a blank; is that right?

A That is correct.

Q Would you go back to page 16, Mr. DeSalvo, of your statement? Go to line 12, if you will. You were asked:

"What is the purpose of sending these Telexes? I think you call them fixture Telexes."

And you answered "Just to confirm that these are the terms and the conditions that were agreed between the two parties and if there is something that is out of order or what either one of them thought that day" --

And there you are cut off by counsel who says to you:

"This was to avoid misunderstandings. Isn't that the very purpose of it?"

I want to ask you, Mr. DeSalvo, if you had not been cut off by counsel how were you going to complete

that sentence?

MR. ESTABROOK: I object to this question.

THE COURT: He may answer.

A "One of them thought they had said during the negotiations."

Q Isn't the sense of what you were saying that "The fixture Telex does incorporate those matters which have been agreed upon"?

A That is correct.

THE COURT: That it doesn't necessarily purport to include all of the terms of the deal as it might be worked out?

A I don't know what you mean by that, but all the terms that were discussed in the offers and the counter-offers, what my understanding of the final confirmation of those terms was I put in the Telex. If there was something that one of them didn't agree with, then they could say so.

31 Q That is right. If there was something that they didn't agree with in your fixture Telex then they weren't bound by it, were they?

A No, I don't --

Q You don't claim, do you, as a broker negotiating on behalf of two parties that because you put out

a fixture letter or what you choose to call a fixture letter that necessarily binds both of those parties, do you?

THE COURT: Objection sustained.

MR. GILCHRIST: That is the heart of this case, your Honor.

THE COURT: I don't like argument when I make a ruling. I think that is a question for me to determine, not this witness.

MR. GILCHRIST: I think it is material to know what the witness thinks.

THE COURT: I don't want argument on questions when I rule on evidence.

MR. GILCHRIST: I don't mean to be irritating.

THE COURT: You don't mean to be irritating when you really are aggravating, if you get what I mean, and I don't like to interfere with counsel in his cross examination unduly but this witness is not to decide questions of law. I am.

MR. GILCHRIST: It is what his own understanding was.

THE COURT: Please. Next question.

Q Mr. DeSalvo, in the course of yesterday's testimony, and arose, if I recall, when you were explaining to his Honor what the

words sub-details meant, allusion was made to Lloyds Register of Ships. Do you recall that?

A Yes, I do.

THE COURT: I mentioned that. I asked about that.

MR. GILCHRIST: Yes, your Honor.

Q Just for purposes of clarity, do you recognize this as one of the two volumes of Lloyds Register of Ships for 1971-1972?

A Yes, I do.

Q Would you agree with me that this page is a Xerox of the page covering the entry for the Oswego Reliance?

A Without reading all the things, if you say it is, it is.

Q It includes the Oswego Reliance; right?

A Yes, it does.

THE COURT: You'd better mark that page for identification. If you want to introduce it in evidence, introduce it.

MR. GILCHRIST: This will be respondent's I.

(Defendant Respondent's Exhibit I marked for identification.)

THE COURT: Do you have an extra copy for me?

xxxxx

MR. GILCHRIST: Yes.

THE COURT: Thank you. Do you offer it in evidence?

MR. GILCHRIST: Yes, I want to offer it in evidence, your Honor.

THE COURT: Any objection?

MR. ESTABROOK: No.

THE COURT: Received in evidence by consent.

(Defendant Respondent's Exhibit I received in evidence.)

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Q Correct me if I misstate this, Mr. DeSalvo. I have the impression when you and his Honor had this colloquy --

THE COURT: I asked him questions, not colloquy.

MR. GILCHRIST: That is correct, yes.

THE COURT: That is different from colloquy.

Q -- that his Honor might have understood you to say when you were telling us what sub-details meant to you that it was nothing more than the items appearing in this Exhibit I. Am I wrong?

A Yes.

Q It does include more than that; correct?

A Correct.

Q Your definition of sub details?

A That is correct.

Q It goes much beyond this, does it not?

A May I see that?

Q Yes.

A There are many details beyond this, yes.

MR. GILCHRIST: I have no further cross examination at this time, your Honor.

THE COURT: Any redirect?

MR. ESTABROOK: Yes.

REDIRECT EXAMINATION

BY MR. ESTABROOK:

Q Mr. DeSalvo, where did you work before you worked with Poten Brothers?

THE COURT: He has told us that, hasn't he?

MR. ESTABROOK: Not what he did.

A Standard Oil of Indiana.

Q What was your experience there?

A I started as a graduate chemical engineer and in the staff department and went through various economic and scheduling departments into the foreign end of the business.

From there in scheduling include supply into the chartering end.

Q How many years did you spend in the chartering end of Amoco?

A Five years.

Q Then you spent four years with Poten?

A That is correct.

Q Did you have any conversation with Mr. Spears concerning this statement?

A Yes, I did.

Q Do you remember when they were?

A I believe it was started before I made the statement and some of them continued after I made the statement.

MR. GILCHRIST: This is direct. I am wondering what the materiality is.

THE COURT: I don't know myself. Maybe he is not going to ask him any more questions.

Q Did you make any offer to Mr. Spears?

A Yes, I offered to send him a copy of the statement.

Q Did you make any other offering concerning the statement?

A I offered to have him come and take a statement of his own.

Q Did he ever take a statement from you?

A No, he did not.

THE COURT: I don't know what bearing this has on

this case.

Q I want you to look at Exhibits G and H and ask you if you recognize the signatures?

A Yes.

Q Whose signature are they?

A Harry Theodoracopulos.

Q On both?

A That is correct.

MR. ESTABROOK: No further questions.

MR. GILCHRIST: I have no further questions.

THE COURT: All right, thank you.

(Witness excused.)

THE COURT: Next witness.

H A N S P R O E L L E R , called as a witness in behalf of the Petitioner, after having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ESTABROOK:

Q Mr. Proeller, by whom are you now employed?

A By a company called Fritzen-Halcyon Lijl.

Q How long have you been so employed there?

A 12 years.

Q What is your position?

A Chartering manager, vice president.

Q Have you at my request looked at Exhibits 2 and 3, the fixture Telexes?

MR. GILCHRIST: Your Honor, I think counse. is a little premature. I gather this gentleman is being offered as an expert. On what I don't know. I don't think he has been qualified.

THE COURT: I don't see anything has been done except to ask him whether he has looked at the two Telex messages.

THE WITNESS: Yes, I have.

Q By the way, how long have you been a chartering manager?

A Since I came, 12 years ago.

Q That is in New York?

A In New York.

Q Are you familiar with the practices of chartering ships in New York?

A Yes, indeed.

MR. GILCHRIST: What exhibits have you put before him?

MR. ESTABROOK: 2 and 3.

Q Have you read Exhibits 2 and 3?

A Yes, I have.

Q I provided you with copies, have I not?

A Correct.

Q Do you have an opinion as to whether in accordance with the chartering practices of the chartering business in New York the provision for a suitable drydocking clause to be arranged --

MR. GILCHRIST: Your Honor, --

THE COURT: Let him ask the question.

Q -- is an essential part of the contract so that without the drydocking clause being made absolutely determinate the charter fixture could not be considered accomplished?

MR. GILCHRIST: That is leading.

THE COURT: Objection sustained. It is not only leading but I don't think it is a proper question to ask.

MR. ESTABROOK: I will withdraw it, your Honor.

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THE COURT: I am not going to listen to this man about what he thinks what contract spells out or whether the fixture Telexes make a contract or not. That is for me to decide.

The question is the contract sued upon here. This is the fixture contract. That is it.

Q What is the practice in New York as far as arranging for a drydocking of a ship under charter?

A The charter has to provide for a drydocking clause --

MR. GILCHRIST: Just a second.

A -- provided --

MR. GILCHRIST: I am objecting, Mr. Witness.

THE WITNESS: Yes.

MR. GILCHRIST: I don't think it has been established that this witness knows what the practice is in New York, your Honor.

THE COURT: I don't care what the practice is in New York. I don't think it is material. We have had a lot of questions asked here of this last witness that were immaterial.

MR. GILCHRIST: I take it I have my exception.

THE COURT: I am ruling in your favor. You don't want to except to that, do you?

MR. GILCHRIST: No, I don't.

THE COURT: All right. You can, if you want to.

MR. GILCHRIST: No, I will withdraw that exception, your Honor.

Q What are the factors that are considered by a ship owner in arranging for the drydocking of a ship under charter as practiced in New York?

MR. GILCHRIST: Objection.

THE COURT: Is there a practice, first.

MR. ESTABROOK: Yes.

Q Is there a practice in arranging for drydocking of ships under time charter?

A Yes, sir, there is in any time charter provided it is long enough that the drydocking will fall within the prospactive time charter period.

THE COURT: He has told us it has to be at the owner's expense unless otherwise provided for.

Is that correct?

THE WITNESS: That is correct.

Q What is the practice as far as deviation to enter a drydocking port?

A If there is any deviation involved it is likewise at owner's expense.

A charterer is held harmless for any extra time that a ship must need to get to a drydocking port.

MR. ESTABROOK: That is all.

THE COURT: Any cross examination?

MR. GILCHRIST: Yes, sir, your Honor.

CROSS EXAMINATION

BY MR. GILCHRIST:

Q Is Fritzen a vessel owner?

A Yes, it is.

Q Mr. Proeller, what kind of vessels do they own?

A Bulk carriers and tankers and oboes and other combination ships.

Q How many tankers do they own?

A Presently four.

Q Of what size?

A Two we are building.

Q Pardon?

A 80,000 tonners and 60,000 tonners. They are under the Iberian flag.

THE COURT: Who are the owners?

THE WITNESS: Swiss, German and Dutch owned.

Q You have two tankers presently and you have two that are building; is that it?

A That is correct.

Q When you answered Mr. Estabrook's question to you about the practice in New York with respect to the drydocking clause, did you have any special form of drydocking clause in mind?

A Like, for instance, the one in the Mobil time charter, yes, even though just about any time charter form will have a drydocking provision.

Q Do you consider yourself in your position at Fritzen more as an owner or a charterer?

A More as an owner's representative, even though we have taken on tonnage in which case we are charterers. It has happened both ways.

Q Have you ever taken in as charterer a 50,000-ton tanker on time charter for a year?

A Not a tanker, but bulk carriers.

Q I am talking about tankers, Mr. Proeller.

A All right. Not a tanker.

Q Then you have never had the experience of working a tanker on a one-year time charter as charterer; is that correct?

A Not as charterer, no, but as an owner.

Q You have never had the experience of being charterer of a tanker for a one-year plus period?

A Correct.

Q So am I correct in saying that you have never actually dealt with the situation as a charterer of what happens as you try to program your way around let us say, for example, a November 15 drydocking guaranteed to have to occur in the owner's option at Spain or at Portugal or possibly Japan?

A I'm afraid I have not seen anything about Spain, Portugal or Japan in this document.

THE COURT: I don't know that this witness has

given any testimony which warrants the nature of your cross examination.

MR. GILCHRIST: I consider it is established that he would be incompetent to testify as to the last question I put so I am going to withdraw it.

THE COURT: It has been answered. If you move to strike the answer, all right. Leave it in the record. I'm not going to pay any attention to it anyway.

Any other questions?

MR. ESTABROOK: No. Thank you.

THE COURT: Thank you very much.

(Witness excused.)

MR. ESTABROOK: Mr. Kelley.

J O S E P H R. K E L L E Y, J R., called as a witness in behalf of the Petitioner, after having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ESTABROOK:

Q Mr. Kelley, by whom are you now employed?

A Bethlehem Steel Corporation.

Q What is your job with them?

A I have the title of attorney. I work for the

law department and have so for the last two and a half years.

Q Are you also an officer of some of the Bethlehem subsidiaries?

A Yes, sir.

Q What are those subsidiaries?

A Ven Pet Incorporated. Ven Oil, Ven Ore Transportation Company, Calmar Steamship Company, Steamship Services Corporation and Interocean Shipping Company. I believe that is all.

Q How many ships do these corporations control?

MR. GILCHRIST: Did he testify that he was also an officer of Interocean?

THE COURT: Yes.

MR. ESTABROOK: Yes.

THE COURT: That was the last.

A These corporations own approximately 19 vessels with one building.

Q What insurance do these vessels have?

A All these vessels --

MR. GILCHRIST: Do you know, Mr. Kelley?

A I'm sorry. I lost the question.

MR. ESTABROOK: I object to the interruption.

MR. GILCHRIST: We don't know that the witness

is testifying to something that he knows about.

Q Do you know of the insurance arrangements covering these 19 vessels?

A Yes, sir.

Q What insurance is there on these 19 vessels?

A They are self-insured in the Bethlehem program.

Q Is there a so-called bumbershoot or excess?

A Yes.

Q What is that?

A It is $25 million over and above the first $10 million.

Q Who, in 1971 was the manager of the marine part of Bethlehem insurance?

A Mr. E. D. Jefferson.

Q In the two and a half years you have been with Bethlehem how many vessels were seized in connection with the P & I claim?

A None.

33 Q Can you estimate how many lawsuits you have had?

MR. GILCHRIST: I don't know what materiality this has.

THE COURT: Self-insurers. That is all we need to know about.

Q And the vessels have never been delayed?

MR. GILCHRIST: If counsel wants to testify--

MR. ESTABROOK: You may cross examine.

THE COURT: Any questions at all of this witness?

MR. GILCHRIST: Yes, I will have one or two, your Honor.

CROSS EXAMINATION

BY MR. GILCHRIST:

Q Does the Bethlehem self-insurance program involve entry with any of the Protection and Indemnity Clubs, Mr. Kelley?

A No, sir.

Q Who would you contact if one of your vessels did get into difficulty, for example, in the Persian Gulf? Do you know?

A The local agent on the loading port or discharging port or the nearest port.

Q Does Bethlehem have local agents all over the world?

A Yes, sir.

Q Their own local agents?

A No, sir, outside contract employees.

Q Who was your agent at Rastaniera?

A I don't know.

Q Would you know who your agent is at Abadan?

A No, sir.

Q Or anywhere else in the Persian Gulf?

A No, sir, I do not know personally.

Q Who would know?

A Operations would know.

Q Mr. Kelley, how long have you been admitted?

A To the bar?

Q Yes.

A 13 years in December.

Q Was it your idea, Mr. Kelley, to take this statement of Mr. DeSalvo back in April of 1971?

A Yes, sir.

Q Have you looked it over recently?

A I glanced at it.

Q When is the last time you did look at it?

A This morning.

Q Mr. Kelley, I was looking over it last night and, if you don't mind my comment, maybe you'll agree with me and maybe you won't --

THE COURT: I don't like these conversations which should be held outside in the hall. Just ask questions here. Have your little private talks outside in the hall.

Next question.

Q Mr. Kelley, by my count in a 40-page deposition you went off the record 18 times. Can you explain to us why it was necessary to go off the record 18 times?

MR. ESTABROOK: I object to this.

THE COURT: Overruled.

MR. ESTABROOK: He is now making Mr. Kelley his witness.

THE COURT: I don't care if he is making Santa Claus his witness. It is a perfectly proper question.

Q Do you remember why it was necessary --

THE COURT: You have asked the question. I have sustained an objection to the question.

Why did you interrupt the taking of this statement 18 times and go off the record?

THE WITNESS: I'm not saying that I interrupted the statement 18 times or any number of times. There were several interruptions for phone calls and messages coming in, coffee being brought in. Sometimes on a point Mr. Germano might have interrupted with a question or some comment and there was sometimes points of clarification. I don't consider it a deposition. I consider it a sworn statement in question and answer form.

THE COURT: It was an unofficial interrogation?

THE WITNESS: That is right, sir.

Q I gather the purpose of this, Mr. Kelley, as explained to us by Mr. DeSalvo, was that you anticipated there might be some litigation over this matter; is that correct?

A That is correct.

Q And you wanted, before the witness' memory faded, to get from him the fullest and most accurate account possible of the facts?

A Essentially that is correct, yes.

Q By th I mean all the facts.

A All the material facts, yes.

Q Everything that he said during the course of these negotiations and that the other parties thereto said; is that correct?

A No, it is not correct.

Not everything. The material things.

Q Were you interested in some particular facet of the negotiations?

A No, not one facet. I wanted the A to Z approach from the beginning to the end.

Q That means all the relevant and material facts does it?

A Yes, it does.

Q Are you satisfied that you got them?

A I don't know. It is Mr. DeSalvo's statement, not mine.

MR. GILCHRIST: I have no further questions.

THE COURT: Thank you very much.

MR. ESTABROOK: Thank you.

(Witness excused.)

THE COURT: We will take our recess now rather than have another witness. It is a quarter of 1:00.

(Trial recessed until 1:30 p.m.)

AFTERNOON SESSION

1:40 p.m.

MR. ESTABROOK: Subject to calling the witness Willy Gorrissen, who is unable to be here and who I may not call, that is the Petitioner's case.

THE COURT: The Petitioner rests, then?

MR. ESTABROOK: Yes.

THE COURT: All right.

MR. GILCHRIST: Your Honor, Respondent's call Mr. Harry Theodoracopulos.

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HARRY THEODORACOPULOS, called as a witness in behalf of the respondents, after having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GILCHRIST:

Q What is your position, Mr. Theodoracopulos?

A I'm vice-president of National Shipping & Trading.

Q Were you vice-president in March of 1971?

A Correct.

Q Are you an officer of the respondent Hellenic International?

A No.

Q Are you a stockholder of the respondent Hellenic International?

A No.

Q Is Hellenic International a subsidiary of National?

A No.

Q How long have you been with National, Mr. Theodoracopulos?

A Since 1954.

Q What have your duties been; will you describe them for the Court starting with their beginning in 1954?

Q Well, in 1954 I worked at sea on various ships of the company and then I worked with the operations department for a while and then I was stationed in Japan for a couple of years on sort of a training program learning new construction, taking care of the paper work of the company there. Then I returned to New York and I was back in operations and around 1962 I was shifted to the chartering department.

Q What is National's business?

A Well, National Shipping & Trading is an agent's company and on behalf of our principals we operate ships and we also charter in ships and generally all these things concerning tramp steamship business.

Q Is the National fleet principally a tanker fleet?

A National doesn't own a fleet. National Shipping are agents for companies that own ships, primarily these, I would say, a tanker fleet.

Q In its capacity as an agency company National acts as agents both for owning companies and it acts sometimes for charterers as well; correct?

A Well, yes. We charter the ships owned by the companies out and we also, on their authority, charter ships in and, you know --

THE COURT: Does National have title as owner

to any vessel?

THE WITNESS: No, sir.

THE COURT: Does it own a charter to any vessel itself?

THE WITNESS: I'm sorry, your Honor.

THE COURT: Did National own a charter to any vessel?

THE WITNESS: No, sir, except as an agent by authority.

THE COURT: Then it wasn't a charterer?

THE WITNESS: Exactly, yes.

Q Did there come a time in March of 1971 that you invited Mr. DeSalvo to lunch?

A Yes, sir.

Q Will you tell us what Mr. DeSalvo said to you at that luncheon and what you said to him?

Before you start, there was such a lunch; right?

A Yes, sir.

Q Who was present at the lunch?

A Mr. DeSalvo, Mr. Spears for a while, and myself.

Q Would you tell us what you said to Mr. DeSalvo and what he said to you at the lunch?

A Well, Mr. DeSalvo had come back, to the best of my recollection, from a trip in Europe so it was we who

wanted to talk to him and get his views on the various people he had seen over there, the views on the market, and generally we discussed, you know, market conditions and sort of picked his brains a little bit or tried to, and then Mr. Spears left -- he had another appointment -- and Mr. DeSalvo and I discussed the possibility of chartering a vessel in for about a year's period speculating with it.

Q When you say you discussed the market that you talked about a vessel, I take it you mean the tanker market?

A That is right.

Q Was there any discussion of the size or period of the vessel at this luncheon meeting or was it just general market discussion?

A There was initially a general market discussion and that took place primarily while Mr. Spears was there. Then after he left Mr. DeSalvo and I discussed about taking a vessel in and Mr. DeSalvo mentioned that there may be a vessel around 50,000 tons that could be had for about a year's period at maybe around $5.50.

Q Was any vessel named at that lunch?

A I don't recall if the name of the vessel was mentioned.

Q What happened after the lunch?

A Well, after the lunch I went back to my office and after a certain period of time, not too long, I called up Mr. DeSalvo and I asked him if that vessel that he mentioned was available.

Q What did he say to you?

A Mr. DeSalvo said he would have to check with the owners of the vessel as it may be negotiating other business.

Q Did he come back to you later that afternoon?

A Yes, he came back and said that the vessel was available.

Q You said, "He came back." Do you mean he called you back on the telephone?

THE WITNESS: Yes. I'm sorry.

THE COURT: That same afternoon?

THE WITNESS: Yes, sir. Very shortly thereafter he called back and said the owners have not chartered the vessel, the vessel is available.

I said, "All right, bring it in firm," by that meaning bring me a firm offer of the vessel.

Q Did he do so?

A Yes, he did.

Q What was said By Mr. DeSalvo in the phone

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conversation that took place when he "brought you in a firm offer"? What terms were mentioned?

A Well, the salient details, rather the description of the vessel deadweight, size, speed, consumption, basic delivery range, lay days, the owner's initial rate ideas, and that is about it.

Q I think you have heard Mr. DeSalvo testify that in this conversation he read to you each of the items that are in black ink on the first page of these two pages of notes which have been marked as Petitioner's Exhibit 1. Does that correspond with your recollection, Mr. Theodoracopulos?

THE COURT: That is not the proper way.

The objection is sustained, the Court's objection.

Why don't you have him testify rather than try to get categorical denials? Let him tell the conversation that he had with this man.

THE WITNESS: I have no denial. This is to the best of my recollection what Mr. DeSalvo offered to me.

Q What he read to you on the phone?

A Yes.

THE COURT: The witness is looking at what?

MR. GILCHRIST: Petitioner's Exhibit 1, your

Honor.

THE COURT: All right.

Q Then you agree with Mr. DeSalvo that he read to you every item that he has listed above this red line?

THE COURT: He so testified.

Q Now, Mr. DeSalvo says that the notes in red ink represent the items that you brought up for a counter.

MR. ESTABROOK: If your Honor please, I object to that. I would like to have the witness testify from his own recollection if he can. If he cannot, then have him so state.

THE WITNESS: I am perfectly willing to testify from my own recollection, your Honor.

THE COURT: Thank you, but don't volunteer. You have a very able lawyer here. You are pay ing him a fee. Let him earn his fee.

Your objection is sustained.

THE WITNESS: May shorten the thing. He may tell you that he correctly states what is on there.

MR. GILCHRIST: I would trying to save time, your Honor.

THE COURT: All right.

Q Do you remember tampering, Mr. Theodoracopulos?

A Yes, I do.

THE COURT: Did you look at this paper, Exhibit 1?

THE WITNESS: Yes.

THE COURT: The red ink markings?

THE WITNESS: I did.

THE COURT: Is that a fair statement of what was said, a fair resume of what was said?

THE WITNESS: Yes.

THE COURT: It is?

THE WITNESS: Yes.

Q Have you looked at this item at the top right, Mr. Theodoracopulos?

A No. I don't understand what this means, though.

THE COURT: What what means?

THE WITNESS: I don't understand the way it is written out here what the broker's shorthand, the private shorthand means.

Q Mr. Theodoracopulos, Mr. DeSalvo has testified, and let me read exactly what is here:

"Hellenic Int'l Shipping S.A., Panama, sub National Shipping."

Mr. DeSalvo has testified that you told him that Hellenic was a subsidiary, a wholly-owned subsidiary of National Shipping?

A No, I couldn't have told him that.

THE COURT: Did you tell it to him, yes or no?

THE WITNESS: No, sir.

Q What, if anything, did you say to him about the relationship of Hellenic and National?

A What I may have, probably did tell Mr. DeSalvo, is that the charterer would be either National Shipping or Hellenic International.

THE COURT: Did you say a few minutes ago that National Shippingnever took a charter in its own name? Didn't you tell me that?

THE WITNESS: I said that we didn't unless we had authority.

THE COURT: On behalf of somebody else?

THE WITNESS: On behalf of somebody else.

THE COURT: Did I understand your last answer to mean that you told DeSalvo that you would take a charter in National's name on this ship?

THE WITNESS: I told him the charterer would either be National Shipping, implying that we would have authority by another subsidiary company to do so, or Hellenic International.

THE COURT: But you didn't say anything about another subsidiary, did you?

THE WITNESS: Not to my recollection, either one or the other.

Q There were several telephone discussions that afternoon of Wednesday, March 17, were there not?

A Yes.

Q And there was mention made of a guarantee by Mr. DeSalvo?

A Yes.

Q Can you recollect what he said to you about that cnnection and what you said to him?

A To the best of my recollection Mr. DeSalvo said that the owners would require some sort of a guarantee. I told him that I would Like to see -- I would like to see from them what guarantee they would require.

Q Is that all that was said about the matter of the guarantee?

A That was all that was said.

Q Did there come a time that day -- I am referring to Wednesday, March 17, 1971 -- when you received a Telex from Mr. DeSalvo?

A Yes.

MR. GILCHRIST: Would you mark this for identification?

THE COURT: Is that a copy of the Telex we already have in evidence?

MR. GILCHRIST: This is the one that actually came in. The other one is a copy.

THE COURT: The one that we have in evidence is what exhibit?

MR. GILCHRIST: Exhibit No. 2.

THE COURT: And this Exhibit now that you are offering in evidence as J is a duplicate of this, the original of this.

MR. GILCHRIST: Your Honor, on a Telex machine this is what comes in at the receiving office.

THE COURT: Yes.

MR. GILCHRIST: But it has a time stamp on it. That is the reason I am offering it.

THE COURT: I will receive it in evidence.

Do you have any objection to it being received in evidence?

MR. ESTABROOK: Of course not.

(Defendant Respondent's Exhibit J was received in evidence.)

xx MR. GILCHRIST: I might point out to your Honor I am not offering it for the two lines typed in on top which were added later.

THE COURT: Added later by whom? By your client?

MR. GILCHRIST: I don't know. Somebody in my client's office.

MR. ESTABROOK: It speaks for itself, your Honor.

THE COURT: May I see what you are referring to?

MR. GILCHRIST: Yes.

THE COURT: The document has to be offered in its present form. This is produced from his files, I take it.

MR. GILCHRIST: That is right.

THE COURT: It is stamped "Received 1971, March 17, 5.36, National Shipping & Trading Corporation."

Were you in your offices when this Telex came in, Mr. Theodoracopulos?

A Yes.

Q Was Mr. Spears also there?

A Yes, sir.

Q Did you have a discussion of this Telex?

A Yes. What happened is that I had been discussing the trading of the ship with Mr. Spears and we had just installed a new Olivetti Computer which I was not terribly familiar with. Mr. Spears was going to run some additional calculations on the ship.

Q Meaning the Oswego Reliance?

A Meaning the Oswego Reliance. And we were communicating with each other about the negotiations. Then Mr. Spears came to my office about, you know, around just before six o'clock and said, "But did you conclude the ship?"

I said, "I certainly did not."

He said, "This is the Telex that came in," and he showed me this Telex.

So I told him that we had gone over certain details of the charter, like the rate, and we had agreed on that. We had agreed on the period and we had agreed on a couple of other points, the lay days. But we had not agreed on anything else. We were subject details.

Then I called up Mr. DeSalvo, whom I couldn't get by that time. It was after six o'clock.

Q What happened next, Mr. Theodoracopulos?

A Next morning I called Mr. DeSalvo and I expressed to him my great surprise why he had sent this Telex over.

Q What did dyou say to him and what did he say to you?

A Well, I told him that in the first place Hellenic is not a subsidiary of National Shipping & Trading and that I couldn't understand this Mobil time

excluding Clause 9 and this type of clauses here. I didn't understand what that was doing in the Telex and I told him he had certainly not put in this Teletype the fact that we were subject to details, all the rest of the terms to be discussed.

I told him that I wanted him to prepare a pro forma charter party and since they wanted the guarantee, to send me what the owner want in the form of a guarantee so I could go over them.

Q Did you say anything to him in this conversation about the drydocking?

A I told him that November was a bad time to drydock, so he said to me, "Well, they have some clause they want to propose for drydocking because the vessel has to dock in November."

So I told him, "Well, send it over with the other details and we will go over it."

Q Did you tell him that a November drydocking would tie your hands and would be unacceptable?

MR. ESTABROOK: I object to this as leading. The witness should testify from his own recollection.

THE COURT: Yes, sustained.

What else did you tell him, if anything, at that time? What else did he say to you?

THE WITNESS: To the best of my recollection, your Honor, I told him that he had been presumptuous, that this was not a Teletype that set forth -- we had a lot of inaccuracies in it and we had still to discuss all the other matters of the charter party.

THE COURT: What did he say to you, if anything, during this conversation?

THE WITNESS: He said to me he was going to prepare a pro forma charter party and send it over.

THE COURT: Did you send him any Telex message bck rejecting his Teletype?

THE WITNESS: I called him.

THE COURT: Did you send him any Telex message back?

THE WITNESS: No.

THE COURT: And you couldn't get him the night before?

THE WITNESS: The girls were all gone from the office. It was after six o'clock.

THE COURT: Did you have anybody there that could operate the Telex?

THE WITNESS: Well, the one -- there weren't that many people after six.

THE COURT: Do you operate a typewriter, a Telex?

THE WITNESS: No, I can't type and I can't operate the Telex.

THE COURT: How about Mr. Spears?

THE WITNESS: I don't think he does either. We have a secretary for that.

THE COURT: I know you have. But Mr. Spears is quite competent with the computer; isn't that right?

THE WITNESS: With the computer. That is a question of --

THE COURT: I say he is quite competent with it.

THE WITNESS: Yes, he is.

THE COURT: Did he ever send out any Telex messages himself?

THE WITNESS: Not that I ever seen, no.

Q When you talked to Mr. DeSalvo the following morning did Mr. DeSalvo take issue with your statement to him that you had no fixture?

A No.

Q What did he say?

A Well, they -- the main thing I remember Mr. DeSalvo saying is that -- after what I said before, he was going to draw up the charter party, is when we mentioned about the drydocking.

He said, "Well, they must drydock in November."

Now, in the afternoon of the same day I remember that he said, "They must drydock in November and they must have a clause that limits -- you have to guarantee that you are going to place the vessel for them to dock in certain places."

Q What were those places?

A These places were generally the Iberian Peninsula, which is Spain and Portugal, and Japan.

Q What did you say to him when you heard this from him?

A Well, I told him that not only was drydocking in November bad enough for a charterer but it was commercially completely unpalatable for us to have to be able to position eight months hence a vessel either in the Iberian Peninsula or in Japan and under no circumstances would we accept this clause.

Q Did you explain to him why this was so unacceptable?

A I told him there was no one that can schedule eight months hence when he is just playing tramping voyage by voyage to be in a certain place eight months hence and not jeopardize his commercial possibilities.

Then Mr. DeSalvo said to me, "Well, I think this is going to be difficult because I understand they have

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some agreements with shipyards in the Iberian Peninsula and Japan. They do most of their repair work over there."

Q This was on the following day, Thursday, March 18?

A This was, I believe, in the afternoon, Thursday afternoon.

Q On that same day, Thursday, the 18th, did the topic of Chevron come up?

A Yes.

Q Can you remember what he said to you in that regard and what you said to him?

A Well, in every one of our conversations with Mr. DeSalvo we discussed tanker market conditions and what was happening. This is the normal course for people in our business to do and at one time Mr. DeSalvo mentioned, around noontime or so, that this possibility of Chevron having a requirement for a vessel of this size for PG to South Africa. I told him to check it out and let me know.

Q Did you authorize him to make a firm offer on your behalf to Chevron?

A Absolutely not.

Q Did the question of TOVALOP arise on Thursday?

A Yes, it did.

Q Do you remember how it came up?

A Mr. DeSalvo in our conversation in the afternoon mentioned that they had approached Chevron about offering them a ship and Chevron had said:

"Well, any ship that you want to put up to us has to be a member of TOVALOP," so then he came back and told me, you know, even if we want to work with Chevron we cannot work on it because the vessel has to be a member of TOVALOP and they are.

Q Had the question of insurance of any form been discussed with you on Wednesday prior to his sending the alleged fixture letter?

A No.

Q It was a topic that was not discussed at all?

A We concluded negotiating the easy items that, you know, you either get together on or not like the rate, the period, and these things at about just before five o'clock on the 17th and after that we didn't talk to each other. Presumably everybody went home.

Q Is the phrase Mobil time -- or take any standard charterer, say Esso time, Texaco time sub-details a common phrase used in chartering in the tanker industry?

A Yes, it is.

Q What does it mean to you?

A To me it means that I will have to have all the details -- that unless I have all the details agreed upon that I have no fixrure.

Q What does the sub-part of "" is abbreviation, sub-details, mean?

A Subject to mutual agreement of all the terms.

Q Were there further discussions on the TOVALOP matter?

A Well, I, of course, expressed to Mr. DeSalvo our concern and I told him to make sure we have TOVALOP in the pro forma charter party in drawing it up, otherwise we will not be able to charter our ship to any of the major oil companies who are beginning to request this new clause. So I told him to make sure that the owners were entered into TOVALOP.

Q What did he say?

A He said he would pass it on to them. But we had a number of conversations on that but first, initially, the reaction was --

Q We are still with Thursday the 18th now?

A Right.

Q Were there further conversations on Friday the 19th?

A Right. Mr. DeSalvo advised me that Interocean Shipping was not willing to enter the vessel into TOVALOP, and when I asked him "Why not?" he said that they felt if they entered one vessel they would have to enter the rest of the fleet and this is something that the people who were doing the every-day chartering could not decide but it had to go to a higher echelon, being that there was a large company, et cetera, et cetera.

Q Do you remember how the matter was left on Friday the 19th?

A Yes, I do. The matter was left that they would have highers up who, it was told to me, undoubtedly would have to check with London. This being Friday around eleven o'clock, some time like that with London closing, by the time they got a reply Monday they felt that the earliest we would have a reply from them would be either Monday some time or most likely Tuesday.

Q As of the end of the day on March the 19th, Friday, had you been furnished by Mr. DeSalvo either with the pro forma charter party or the form of the guarantee?

A No.

Q When did you first get the pro forma charter party?

A I received the charter party some time on Monday,

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I think it was, you know, in the morning, in the a.m., Monday in the a.m.

Q Did you ever receive from Mr. DeSalvo the form of a guarantee?

A No.

Q What did you do when you got the pro forma charter party on Monday?

A Well, I started looking it over, but sort of in a halfhearted way, because we were still apart on two major details which it looked to be almost impossible to solve. So I just gave it a cursory look, noticed -- made a few notes on a few more points and passed these points on to Mr. DeSalvo.

Q What did you say to Mr. DeSalvo after you received the pro forma and what did he say to you?

A Well, I objected first to his delivery range. I wanted the Red Sea included in that. Then he had an exclusion of Communist countries and I told him that I would agree to, of course, exclude at that time Cuba and Red China but I would want to have Yugoslavia and Poland because these were countries where Liberian vessels did call.

And then I had a note on the payment of hire. They had payment of hire monthly and I said, well, this is unusual. Hire is usually paid semi-monthly, and, oh,

maybe there were one or two other points like that.

Q Didn't that pro forma that you received on Monday have added to the printed drydocking clause this guarantee that you would go to Spain, Portugal or Japan?

A Yes.

Q Did you say anything to Mr. DeSalvo about that?

A Well, I repeated to him again that this was totally unacceptable to us. We cannot guarantee eight months ahead or whatever period it is that we are going to put a vessel in a certain area. By doing that we tie our hands, you know.

Q What did Mr. DeSalvo say to you in reply to your comments?

A Well, I don't recall, of course, his exact words, but he was pessimistic.

"This may kill the business," he said, "because these people must have it."

Q Did you have further conversations with Mr. DeSalvo on Tuesday morning, March 23?

A Yes.

Q Do you remember what you said to him and what he said to you?

A Well, Mr. DeSalvo called me up and said that Bethlehem -- I mean Interocean had decided to enter the

fleet into TOVALOP. He said that the chartering people of Interocean realized and they were willing all along -- they were willing to recommend to the management that the vessels be entered. Management had agreed. The vessels were going to be entered into TOVALOP but the charterers would have to pay the premium.

Q What did you say to that?

A Well, frankly I hit the roof. I told him that this was absolutely an owner's item. It is inconceivable that anybody else except the owner would have to pay for it in some sort of way. I told him these people were impossible and we would just never accept it, and I was very emphatic about it.

Q Do you recall what time of day this was on Tuesday, the 2rd?

A Well, it had to be just about noontime because afterwards I left the office for vacation.

Q Did you and Mr. Spears have a discussion where matters stood with respect to the Oswego Reliance before you went off on your holiday?

A Yes, sir, but Mr. Spears had been in touch pretty much. But I sort of briefed him just before I left as to what the last developments were and, you know told him where we stood.

Q In any of the conversations that you had with Mr. DeSalvo before you left on your holiday, did Mr. DeSalvo ask you for language for the drydocking matter which would would be acceptable to you?

A No.

MR. GILCHRIST: Your Honor, I think that completes my direct of this witness.

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MR. ESTABROOK: At this time I ask Mr. Gilchrist for any papers he has produced in response to my subpoena.

CROSS EXAMINATION

BY MR. ESTABROOK:

Q Do you have any handwritten notes, Mr. Theodoracopulos?

A No, I don't.

Q Do you dictate any diary entries to your secretary at the end of the day?

A Diary?

Q Diary, yes.

A No, I'm afraid not.

Q Then you are testifying only from your personal recollection and from the Telexes; is that correct?

A I'm testifying from personal recollection.

Q How long have you been in this country?

A I first came to the United States in 1948.

Q You are familiar with the English language?

A I would say so.

Q And English is really the commercial language in the shipping business, is it not?

A I would say so.

Q When you received Exhibit J -- that is the Telex in front of you, is it not?

A Yes, it is.

Q When you received Exhibit J, what was the meaning of the word fixture in that?

A What is the meaning?

Q Yes.

A Of the word fixture?

Q I mean the word fixed.

A The word fixture means to me conclusion of a negotiation.

THE COURT: That is a pretty good definition.

MR. ESTABROOK: Of course it is.

THE WITNESS: Thank you.

Q Were you in agreement with the use of the word fixed in Exhibit J?

A Certainly not.

Q You had a Telex machine in your office, did you not?

A Yes, we do.

Q And it was in operating condition on March 18, was it not?

A If we received this it must have been.

Q You received that the 17.

A Oh, on the 18th. Yes.

Q You don't recollect it being broken on the18th?

A No.

Q Isn't the common practice when you receive a message by Telex to answer a message by Telex?

A Not necessarily, not when a person is one phone call away, not when it is a person that you talk to many times a day, not when it is a person that you have done a lot of business with and that you are reasonably close to.

Q How many times a day do you talk to Mr. DeSalvo?

A Well, at that time I used to talk to Mr. DeSalvo very often. Not too long ago I had been on a trip to Spain with him where we had been together for a number of days and I would say that I was quite close to Mr. DeSalvo.

Q And you were able then to recollect conversations two years ago without any notes despite the fact that you talked to him many times, many days?

A Is that sort of an inuendo, counselor?

THE COURT: Don't make yourself a lawyer. Don't argue with the lawyer. Listen to his question, think of it, and then make a responsive answer.

THE WITNESS: Yes, sir.

THE COURT: Don't try to match wits. Go ahead. Next question.

THE WITNESS: Would you repeat the question, please?

Q Are you able clearly to recollect specific conversations two years ago with Mr. DeSalvo in March of 1971?

A Reasonably so, yes.

Q And yet you talked to him several times each day -- that would be about 10 times a week, would it not?

A We talked to each other, I would say, daily about the market. I either talked to him or Mr. Randy Harrison in the firm.

Q You must talk to him then almost 500 times a year, don't you?

A Yes.

Q That is about a thousand conversations between then and now; right?

A Could be.

Q And you have no notes, have you?

THE COURT: Did you keep any notes of your talks with him?

THE WITNESS: When I am trading a ship I usually have a small, like secretaries use, type of pad. I just jot down the rates and if something is told to me that is very

unusual then since I am not able to remember seven boiler plate pages of each charter that changes all the time anyway, I usually ask the broker to send a proforma charter party. I go over the charter party carefully. I call him back. I tell him what items or clauses I agree with, what I do not agree with, and after all these things are out of the way -- this I find also, frankly, to be convenient to me.

Q Yes.

A And since the broker gets paid to do that, I see nothing wrong with putting him through this exercise everytime.

THE COURT: Don't make speeches.

THE WITNESS: I'm sorry. I was just trying to explain.

Q What do you do with these notebooks?

A My notebooks I throw away.

Q Did you throw the notebook you had for the Oswego Reliance away?

A There wasn't just the Oswego Reliance. There were all kinds of things in there.

Q When did you throw it away?

A I don't remember.

Q Was this in March or April?

A As soon as the notebook is filled, you know, it is thrown away like everything else, daily correspondence, daily Telex that we are finished with or cables that we are finished with.

Q Did anybody tell you to keep your papers for this litigation, a possible litigation?

A When? What day are you talking about?

Q Any time did people tell you to keep your records for possible litigation?

A After the case started becoming -- lawyers started coming into the case I was told to produce any notes that I had. I told them I couldn't find them, I didn't have them.

Q When was that?

A This must have been after I came back from vacation.

Q What day?

A I came back from vacation, let's see, either the first or the second week in April.

Q And you cleared your desk then?

A Either I or my secretary cleared my desk.

Q Isn't it true that this case went to the lawyers the 24 of March?

A I had left New York on Tuesday, New York time, and was in Colorado.

Q But you know, being a vice president of the company, don't you, when the company first consulted counsel?

A No, I don't.

Q I ask you to look at the top of Exhibit J. Doesn't that say that that Telex went to one J. Pules on March 24?

A When the president of the company handles the case on my departure I don't see that I have to communicate with him about it.

Q Doesn't that indicate that that message went to a lawyer on March 24?

A This does, yes.

Q What do you know about Hellenic, one of the respondents in this case?

A Hellenic is a Panamanian company.

Q How long have you represented them?

A I can't remember when Hellenic was incorporated, but I know it was in existence in 1965 or thereabouts.

Q Wasn't Hellenic at one time a ship-owning company?

A Hellenic International Shipping, S.A, you are saying?

Q Yes.

A Hellenic International Shipping S.A., I believe, owned a vessel, yes, sir, but I am not sure. I have to refresh my mind on that.

Q You had represented them, though, since 1965, had you?

A I believe so, yes.

Q Do you know who the principals of Hellenic are?

A Most of the stock of Hellenic is owned by Hellenic Shipping and Industries Company, Ltd.

Q Do you know the principals of Hellenic Shipping and Industries?

A The principal stockholder of the Hellenic Shipping and Industries is my father.

Q You were not a stockholder of Hellenic?

A No.

Q Is your father a stockholder of National?

A No.

Q Is he an officer of National?

A No.

Q Was he at one time?

A I don't know that.

THE COURT: Who is principal stockholder of National -- your mother?

THE WITNESS: No, sir.

Q Who is the principal stockholder?

A The stock is in trust for me.

MR. ESTABROOK: Could I see Exhibits G and H?

Q I show you Exhibit G, the charter of the Persian Commander dated June 5, 1970 and ask if you recognize the signature for the charter?

A Right.

Q Is that yours?

A As attorney in fact, yes.

Q You were acting as an agent, were you not?

A Right.

Q I show you Exhibit H, which is a letter purportedly on the letterhead of Hellenic care of National and ask if you didn't sign that letter?

A Yes, I did.

35 Q Now, Hellenic has not got a New York office, have they?

A No. We represent them in New York.

Q And so that a cable sent to Hellenic would probably be sent to your office, would it not?

A A cable, if somebody wants to cable Hellenic they

can send it to us and we will forward it to them.

Q Because you were the agents?

A That is right.

Q Does Hellenic have any office of its own in New York?

A No.

Q Does it have any office of its own in the United States?

A No.

Q Did you send any messages in writing or by Telex to Mr. DeSalvo or to Poten between March 17 and March 23 inclusive?

A In writing or by Telex?

Q Writing or Telex.

A No.

Q Did you send to Mr. DeSalvo a proposed drydocking clause on March 21 or March 22.

A The 22nd was on a Monday, wasn't it?

No, I didn't.

Q I show you Exhibit D and ask if you recognize the drydocking clause in paragraph 11 as one proposed by National?

A I don't recall every proposing a drydocking clause to Mr. DeSalvo.

Q Do you recall a conversation with Mr. DeSalvo involving a possible voyage charter for the Oswego Reliance, Persian Gulf, South Africa?

A I recall the general conversation, surely.

Q What?

A I recall the conversation, yes.

Q That would be about a 28-day voyage, would it not? Is that about right?

A Well, about 25.

Q So the possibility of drydocking the vessel in November had no relevance to that trip to South Africa, did it?

A Well, a trip in April, of course, would have no relevance with a November drydock.

Q Is it true that the market fell drastically between March 17 and March 24, 1971?

A No.

Q You testified, I believe, that you thought TOVALOP should have been for owners account?

A Yes, I did.

Q Is it not true that some of the oil companies were paying TOVALOP charges on vessels they chartered, some charters?

A I had no knowledge that they did that.

Q Isn't it true that British Petroleum was paying TOVALOP charges?

A I had no knowledge that they were doing that.

Q Do you charter vessels to BP?

A We do.

Q Are you familiar with the BP bulletins?

A No, I'm not.

THE COURT: BP is British Petroleum?

THE WITNESS: Yes, British Petroleum, owned by the British Government.

THE COURT: You lived for a time in Japan you said, didn't you?

THE WITNESS: Yes.

THE COURT: You said you worked for a time there in the shipyards?

THE WITNESS: Well, yes, in Japan. I didn't personally follow the work we were doing over there.

THE COURT: Did you go to Kobe?

THE WITNESS: Yes, sir, I was in Kobe a great deal of the time, the Oriental Hotel.

THE COURT: Did you know that Bethlehem had a shipyard there?

THE WITNESS: There were two shipyards in Kobe when I was there.

THE COURT: Did you know that Bethlehem had a shipyard there?

THE WITNESS: No.

MR. ESTABROOK: Please mark this for identification.

xxx (Plaintiff Petitioner's Exhibit 8 marked for identification.)

Q Are you familiar with the firm of John I. Jacobs and Company?

A Sure.

Q They are one of the leading London brokers, are they not?

A They are one of the leading tanker brokers, yes.

MR. GILCHRIST: I don't know what the relevance of the document is, your Honor.

THE COURT: I don't know. It is cross examination. If there is no relevance, you object. There is no jury here.

THE WITNESS: I can answer. Do you want me to give you an answer?

Q Yes, after you have had a chance to read it.

A I read the salient point. That point refers to a period with long-time chartering. We have never had a ship for more than voyage chartering onto BP. Therefore,

I regretfully say I was never the beneficiary of this.

Q So you never knew what the BP policy was as to TOVALOP as regards a time charter?

A No, sir.

THE COURT: TOVALOP is of more or less recent origin, 1967 or 1968; is that right?

THE WITNESS: TOVALOP started, I believe, in 1969 or 1970, yes, some time around there.

I don't know exactly when it did. I couldn't tell you that.

MR. ESTABROOK: January of 1969, your Honor.

THE COURT: Thank you.

Q Now, TOVALOP wasn't mentioned in your discussions with Mr. DeSalvo, was it?

A When?

Q On March 17.

A No, it was not.

Q When you received the proforma charter from Mr. DeSalvo did you have certain objections to it?

A Yes, I did.

Q What were those objections?

A Well, the objections, just after a rather cursory look I gave it, were like I said on the delivery I wanted to have Red Sea.

Q That was agreed upon, was it not?

A No.

Q Later on it was, wasn't it?

A If it was agreed afterwards it was after I had left the office. On the day that you mentioned it to me now it was not agreed.

Q Communist countries; is that right?

A The communist countries were another thing.

Q Did you know what the crew was on the Oswego Reliance?

A No, because I never required what nationality the crew was.

Q And the drydocking clause; is that correct?

A I objected also to the payment of hire and of course I objected to the drydocking clause to guaranteeing that I would have to take the ship in a certain area in a certain time.

Q That is quite unusual, is it not?

A I found it very usual, yes.

Q You were here when Mr. DeSalvo testified. You agree that usually the only time they specify a definite port for drydocking is when you have a guaranteed docking?

A I frankly don't recall all of Mr. DeSalvo's

testimony, but I believe it was something to that effect.

Q Is that correct?

A Well, if you have a guaranteed drydocking on a new ship sometimes it is a negotiable point. You try to get it so you can get as near to the shipyard where the ship was built, yes.

Q Is it not customary without a new ship that drydocking is subject to negotiation after the employment of the ship is known?

A Would you say that again?

Q Isn't it true that normally drydocking during a time charter, the place, the exact date of the drydocking is negotiated after the employment of the ship is known?

A Yes.

Q In other words, you work it out after you know where the ship is going to be about that time?

A Yes.

MR. ESTABROOK: Thank you.

MR. GILCHRIST: I have no redirect, your Honor.

THE COURT: All right, thank you very much.

(Witness excused.)

THE COURT: Next witness.

MR. GILCHRIST: Respondents call Thomas Spears.

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THOMAS SPEARS, called as a witness by the respondents, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GILCHRIST:

Q Mr. Spears, what is your position with National?

A I'm president of National Shipping & Trading Coproration. I am also one of the trustees of the trust which has the stock for the benefit of Mr. Harry Theodoracopulos.

Q How long have you been associated with National?

A Many years. I think about 25 or so.

Q Would you explain for us briefly your background with reference to the tanker trade?

A Well, I have been in the shipping business for many years. I have been in the business as a partner in various ventures with Mr. John Theodoracopulos who is the father of Mr. Harry Theodoracopulos. I have made many business decisions and many contracts concerning charters, shipbuilding, bank loans and this over a period of about 25 years.

Q You were present, I take it, for part of the lunch that occurred with Mr. De Salvo and Mr. Harry Theodoracopulos on Thursday, March 17th?

A Yes. We met Mr. De Salvo at Alfredo's Restaurant. I think it was about 1 o'clock, but I didn't stay there. Some time after I finished my meal I left. I had some personal business and I went to a certain office in Brooklyn.

Q When did you next hear about this matter?

A Well, I had left a telephone number with this office with the switchboard operator and I suggested that if someone would want to call me to contact me at the Bailey Refrigeration plant in Brooklyn. While I was there Harry Theodoracopulos called me and he said that a certain ship was proposed to be chartered for a period of time of one year. He asked my opinion. He thought it was a good possibility of taking his ship which we could sublet in the market which appeared to be quite strong then and later than possibly use the ship in connection with some other business that we have with the Pertamina Oil Company, which is an Indonesian oil company.

I said to him, "Well, you may start negotiating. Meanwhile I will be back into the office and we can look this matter over."

He also mentioned to me that Mr. De Salvo had taken the particulars of that ship, in other words, the main particulars. That is to say, the deadweight and the

speed and consumption and had fed this information into his small Olivetti computer and had come out with an equation equating at the time the time charter of that ship to the world scale rate. Mr. Theodoracopulos was not yet familiar with the computer that we also had, a small desk computer, but I was. A man who were employing on chartering also happened to be away from the office. I therefore said "I'll come back and I'll see whether this ship is worth that rate.

"However, what would make it possibly, the equation correct is the owner's representation as to the performance of the ship, that is to say, the speed and the consumption because if these were off, then of course that equation is no longer correct."

Q You got back to the office later that afternoon on Wednesday, March 17th?

A Yes.

I got back. I think it must have been around 4:30 or so and I gotinto the office and I asked Mr. Theodoracopulos what happened.

Well, he said he had agreed on certain terms and that there were other things to be discussed.

I said to him, "All right, I'll see whether this -- how this particular ship would look on our computer and then

we will look into the terms of the charter together."

I was working -- I went over to the computer. As I said before, our chartering man was away on vacation or rather, I'm sorry, he was away on business. He would normally have done this job putting this ship into the computer. I did it and I came up with certain conclusions and by that time a telex comes into the office from Poten & Partners. I looked it over.

Q Are you referring to what has been marked as Respondents' Exhibit J?

A Yes,sir.

Q Were you the one who picked that off the telex, Mr. Spears?

A No, it was brought to me.

Q Do you remember by whom?

A No, I don't remember by whom.

Q But not by Mr. Theodoracopulos?

A No.

Q What did you do when you saw that?

A Well, I talked to Mr. Harry Theodoracopulos and I told him that this thing looks a little odd. I must say that knowing Mr. Theodoracopulos and knowing the way --

THE COURT: Just tell us what you said to him. What looked a little odd? Can you point out anything

particularly? Did you refer to anything in particular in the telex?

THE WITNESS: Yes, I did. I referred particularly to some of the items. I will mention them one by one. First of all, that Hellenic International is a subsiary of National Shipping and also there was this question of a letter of guarantee to be given.

Now, I understood that to mean a letter of guarantee to be given by National Shipping.

I told him that as he knows our public accountants have advised us against giving guarantees of this nature. They also advised us against having National act on behalf of the principals who were not disclosed and this became one of the topics that I talked about to Mr. Theodoracopulos that evening.

Now, the other one which I found very unusual is the exclusions of clauses 9, 12AII, 12BII and 12BIII. I asked him specifically about that, what these crosses were. He said that he doesn't know. In fact, he said he doesn't have the Mobil time charter, the pro forma charter.

Now, I think there was something else here. I am not sure where it was, but there were some questions in my mind about some of these items. He said he was going

to call back Frank. I suggested that he does and try to straighten these things out.

From my later conversation with him I learned that he was unable to reach Mr. De Salvo that evening.

Q Going back to the moment when this came to your attention late that afternoon, did you have any reaction to the first sentence of this telex?

A My recollection of this telex was that -- my response to it was that the broker was over-anxious to conclude the deal and he had sort of jumped the gun presumably because it meant an important piece of business to him.

37 I certainly did not consider this as a fixture. It couldn't have been a fixture. We are talking now about a one-year time charter. We are not talking about a short voyage from the Caribbean to USH. I am talking about a piece of business that involves well over perhaps 3-1/2 million dollars. One doesn't conclude with the snap of a finger li[illegible]hat within an hour a contract of this nature. It was certainly not in my mind a fixture.

THE COURT: Did you see anything unusual about the appropriate letter of guarantee phrase or is that the usual expression found?

THE WITNESS: We had made a guarantee -- when I say

we, National Shipping had made a guarantee at one time some years ago to another shipowner and I had taken this matter up with our --

THE COURT: You told us that you took it up with your lawyer or accountant.

THE WITNESS: Yes.

THE COURT: You missed the purport of my question. Had you seen an expression like this, "With appropriate letter of guarantee," in fixtures or teletypes before that, before the date that you saw this in this case?

THE WITNESS: I don't think so, your Honor.

THE COURT: What did you understand by letter of guarantee, guarantee of what? Is that clear to you?

THE WITNESS: Yes, it is.

THE COURT: What was your understanding of it when you saw that?

THE WITNESS: I believe it meant that National Shipping & Trading Corporation would guarantee the performance --

THE COURT: Faithful performance?

THE WITNESS: -- faithful performance of all the terms and conditions of the charter.

THE COURT: So this was not unusual?

THE WITNESS: The guarantee is unusual. It does

not appear in this type of fixture or charter party.

THE COURT: What this letter of guarantee meant -- you understood it to be a letter of guarantee of faithful performance?

THE WITNESS: That is correct.

THE COURT: Was that the usual understanding of this expression in fixtures during the last 25 years that you were in this business?

THE WITNESS: Your Honor, if a guarantee is given then of course it means that it would guarantee the performance of the terms.

THE COURT: You say you were especially concerned about the speed of the vessel?

THE WITNESS: Yes.

THE COURT: And the bunker consumption of fuel?

THE WITNESS: That is correct, sir.

THE COURT: Did you note in this telex that the speed of the ship was 16.5 knots?

THE WITNESS: Yes, I had noticed that, yes, sir.

THE COURT: Did you notice that it was on 100 Bunker C consumption?

THE WITNESS: Yes.

THE COURT: Were you satisfied that that was a fair performance of a vesse of this type?

THE WITNESS: I was not , sir.

THE COURT: Did you make any complaint about it?

THE WITNESS: I told Mr. Theodoracopulos that 16-1/2 may be an ideal ship and that in fact there was a variance in the computation that we had made on our computer -- the machine is the same as Poten has -- because we had considered as an average performance of that trip at best 16 knots. We tried -- we ran the calculation with 15-1/2 knots and we ran the calculation at 16 knots. The 16-1/2 knots is unusual performance of a ship of this type. At least that is the way I --

THE COURT: That was good performance?

THE WITNESS: An exceptionally good performance.

THE COURT: How about 100 bunker C consumption per day -- was that a good performance on fuel?

THE WITNESS: That appeared to be the right consumption one would expect.

THE COURT: So that you had no complaint then to make on the terms of the fixture with relation to either speed or bunker consumption?

THE WITNESS: In fact I had no complaint at all. The question was to make sure that the representation made was entered into the charter party so that if the ship did not perform we could then reduce the charter hire, and this

is the reason for which we had said that the performance of the ship would be reviewed after six months or if we have a claim we wouldn't wait until the end of the charter, we would get to it before.

THE COURT: That was in the telex, wasn't it?

THE WITNESS: Yes, sir, I believe it was.

THE COURT: Review after six months?

THE WITNESS: That is correct.

THE COURT: Was that a term that had been discussed with anybody before or at Poten?

THE WITNESS: I don't know that, your Honor. I know that in my telephone conversation with Mr. Theodoracopulos before I returned to the office I mentioned to him that matter of making sure that the ship will perform and if it doesn't then the corresponding time charter rate would be less and we should then be able to make a claim against the owners.

THE COURT: You may continue.

Q Do I take it that in the following days, that is to say, Thursday the 18th, Friday the 19th, Monday the 22nd of March you kept informed with Mr. Theodoracopulos about the progress or lack of progress of matters respecting the Oswego Reliance?

A Yes, we had been in contact periodically during

the day on the matters that were to be resolved because this was an important piece of business.

Q Did there come a time on Tuesday, March 23rd when Mr. Theodoracopulos left to go on holiday?

A Yes, that is correct. He did.

Q Did you at that point take up yourself personally from there onward the negotiations which had been conducted by him with Mr. Di Salvo?

A Yes. I talked to Mr. Di Salvo several times that day.

Q We are talking about Tuesday, March 23rd.

A We are talking about Tuesday, yes, in the afternoon, in the early afternoon.

Q What did you say to Mr. De Salvo and what did Mr. De Salvo say to you?

A There were several things. One outstanding item was the TOVALOP. That afternoon I knew that the owners had agreed to enter the ship with TOVALOP, but Mr. DeSalvo told me that the owners are unwilling to pay the premium for that insurance and I said to him that "This is most unusual and this is most unreasonable because the insurance is an insurance for the benefit of the owner and it is always paid by the owner."

Q What else did you say to Mr. De Salvo?

And, as best you can, if you can remember the words you used, use them.

If not, then, the substance.

A Right.

The second problem was the provision to bring the ship to certain countries so that it could be dry-docked in November of that year.

Now, the matter was being discussed with a view to accommodating the owners.

eob 37

In other words, in essence, I told Mr. DeSalvo, as I know Mr. Harry Theodoracopulos also told him before, we wished to cooperate with these owners but we cannot guarantee that at a certain time of the year and with a span of 15 days we will put this ship, which is particularly suitable for trade other than the Persian Gulf Continent or Persian Gulf -- Japan on this run for their convenience. The ship is a 50,000-ton ship. She is best suited to go into those ports where that ship can be taken. The Persian Gulf Continent run of tankers is one in which you find the very big ones, the so-called ULCC, the tremendous mammoth type of tankers. Obviously a 50,000-ton tanker cannot compete on that route. Obviously it sometimes takes business there, as it does in Japan. The same situation is in Japan with the very big 400,000-ton tankers going to Japan, and this would not really be suitable for that run. It would be suitable to send it, for instance, to South Africa and to the Carribean -- US and H. How could we now at this point schedule this ship that much later in the year to be in the areas where they wanted to drydock?

I told Mr. DeSalvo: "We are willing to cooperate with you. We cannot guarantee that this would be done."

THE COURT: By this expression, this line in the Telex reading: About 15 days with proper notices," did you

understand what was meant by the words 15 days?

THE WITNESS: Yes, that the ship would be off-hire for about 15 days within the month of November.

THE COURT: In drydock?

THE WITNESS: From the time she deviated, from the time she became off-hire. In other words, until she came back on hire to us.

THE COURT: Did you understand that the drydocking procedure would take about 15 days?

THE WITNESS: I understand this. This is what it says.

THE COURT: Yes.

THE WITNESS: In my experience I figure 15 days --

THE COURT: Never mind what you figure. You understood that to mean that; right?

THE WITNESS: Yes.

THE COURT: What did you understand to be meant by "with proper notice"?

THE WITNESS: That we would advise the owners as to when the ship sailed from the last -- the loading or discharging part in time so that they could contact the shipyards to make the arrangements for drydocking. Sometimes the shipyards are tied up so you can't

at the last moment send a ship there.

THE COURT: Do you understand the term "With proper notice" meant with proper notice not only to you but to give them ample time to give proper notice, due notice to --

THE WITNESS: It is a very important consideration.

THE COURT: Did you understand --

THE WITNESS: I understood that. May I explain why it is an important consideration, the notice? The tankers are chartered not much ahead of time. Let's say they are chartered maybe 15 days before they go to the loading port or shortly before they can reach the loading port. It is not convenient to give an owner notice and sometimes you can't do it but we -- if the ship were scheduled on a run from the Persian Gulf to the Continent or from the Persian Gulf to Japan, in that case it would not have been a problem, but otherwise it might have been a problem.

THE COURT: Did you know that Interocean Shipping was a subsidiary of Bethlehem Steel?

THE WITNESS: I learned about it, yes. I didn't know it before.

Q Did you know it when this Telex came in.

THE WITNESS: I knew it when the Telex came in.

THE COURT: When the Telex came in you knew about that, didn't you, that Interocean Shipping was a wholly-owned subsidiary of Bethlehem Steel?

THE WITNESS: I didn't. I did not know that it was a wholly-owned subsidiary. I did know that it was a company related to Bethlehem Steel and I was told that it is a Bethlehem Steel Company.

THE COURT: Did you know that Bethlehem Steel was self-insured, so-called?

THE WITNESS: I did not, your Honor.

THE COURT: You had been in business, this shipping business how many years? 25 years?

THE WITNESS: About 25 years.

THE COURT: Go ahead.

Q I am back now, Mr. Spears, to your telephone conversations with Mr. DeSalvo on Tuesday afternoon, March 23. What else did you say to Mr. DeSalvo and what did he say to you?

A I conveyed my concern to Mr. DeSalvo. We were now -- it was already late in the month. The ship arrived in the Persian Gulf. A decision had to be made. Instruction had to be given to the master possibly by the end of the week that we aren't getting anywhere. We had two important issues outstanding there. We had not gotten down to the

other items.

I had asked him to convey to Bethlehem sometime this afternoon our desire to accomodate them because we had hoped that they would finish with this.

But I told him that we cannot guarantee it, we cannot guarantee the drydocking at a certain time.

At some later time in the day he came to me and he said "Now, give me the wording of that clause.

"It is not a matter of words, it is a matter of essence," I said.

He said, "Give me the wording. I will pass it on to Bethlehem."

I said, "I'll call back." I jotted down some words on a scrap of paper, a piece of paper. I called him back and I gave him the wording as I thought -- something that we could live with.

Q What did he say he would do with that?

A I asked him to pass it on to the owners and to let me know.

Q Did he get back to you that afternoon?

A No, he didn't.

Q What happened next?

A Well, I sat around the office. I waited for a while and I became -- I was starting to become quite

jittery, frankly, because there was a certain weakness in the spot market in the Persian Gulf. In other words, for a ship that was so prompt --

Q By "prompt," you mean that --

A She was arriving.

39 Q The Telex shows that she was to arrive at the Persian Gulf April 1.

A That is correct, and we still had not agreed on these main items. With the way that these corporations move, so slowly, it might have taken another few weeks. We would have been faced with some kind of a disaster and I really felt very, very uncomfortable.

Q What did you say to Mr. DeSalvo about it?

A I don't know the words, I just conveyed this feeling to him. But then, the next morning, I realized that if they hadn't accepted the latest proposal we made then we shouldn't carry on these negotiations any more, so the next morning I called him up.

Q What did you say to him and what did he say to you as best as you can remember?

A On Wednesday morning I asked him specifically whether he had conveyed the last, my last proposal regarding the drydocking to the owners or if they had accepted it perhaps then we could resolve the matter right

away, if they had accepted it the night before. He told me he had not. Then I said to him, "Well, do not."

Q They had not reached Bethlehem yet or Interocean?

A He didn't tell me they had reached or not reached Interocean. He told me he had given the proposal to the owners and I said to him "Do not." And I saw a certain reluctance on his part and I said, "I instruct you to advise the owners that we are finished, the negotiations are finished. We don't have a deal. We never had a deal and it is too late now. It is much too late."

Q Did anything further happen that day, Mr. Spears?

A Yes, Mr. DeSalvo called back later in the morning and he said that now Bethlehem agrees to both, to pay the insurance premium for TOVALOP and they also agreed to our drydocking clause. I didn't know what "our drydocking clause" meant, but anyway he said that they agreed to our drydocking clause.

Q You sent out a Telex that morning, did you not?

A Yes, sir.

Q I ask you to look at Plaintiff's Exhibit 5. Is this the message that you sent on the morning of the 24th of March?

A Yes, it is.

Q Do you recall what hour of the day you sent this?

A I think it was just before noon or thereabouts, in the later part of the morning.

Q Now, this call that you got from Mr. DeSalvo that you just mentioned, the one in which he said: Okay, owner would pay for TOVALOP and owner would agree to your drydocking clause, did that come in before or after you sent the Telex, if you remember?

A It came in before.

Q Mr. Spears, what does the phrase Mobil time sub details mean to you in your experience in this industry?

A It means that a certain form, a certain printed form of the charter will be used as the basis for concluding the final charter party.

THE COURT: Subject to changes?

THE WITNESS: Subject to two changes.

THE COURT: Set forth in the Telex?

THE WITNESS: Not necessarily, your Honor, because there are many other items that would come about. The teletype, as I understand it, meant subject to working out the details of this charter. That is what we were talking about.

THE COURT: This is an important witness. I don't like him hurried. I think we should take a recess now until 2 o'clock tomorrow afternoon.

MR. GILCHRIST: Fine, your Honor.

THE COURT: This witness shouldn't be hurried nor should the cross examination.

MR. GILCHRIST: 2 o'clock tomorrow afternoon, your Honor?

THE COURT: Yes. I would like to finish the case tomorrow afternoon.

(Recess until April 27, 1973 at 2:00 p.m.)

INTEROCEAN SHIPPING CO.,

Petitioner,

vs. 71 Civ. 3363

NATIONAL SHIPPING & TRADING CORP., et al.,

Respondents.

April 27, 1973,
2:00 p.m.

(Trial resumed.)

T H O M A S S P E A R S , having been previously duly sworn, testified further as follows:

DIRECT EXAMINATION (CONTINUED)

BY MR. GILCHRIST:

THE COURT: The oath was administered to you yesterday, Mr. Spears, and you are still under oath. Anything you say now is under oath.

THE WITNESS: Yes.

THE COURT: All right, counselor, you may go on.

MR. GILCHRIST: Thank you, your Honor.

Q Mr. Spears, I think when the testimony broke with our adjournment yesterday you were being questioned about the drydocking clause. I am showing you now Respondents' Exhibit E and in particular I am referring you to Clause 11A and ask you whether or behalf of the

charterers you would have been prepared to live with the standard printed language of Clause 11A?

A Yes. The drydocking clause is similar to that -- usual to that of any other time charterer of a major oil company. It is the custom in the trade to accept it as is.

Q Would you agree that in such an event it is entirely possible that you would not have actually worked out your agreement with owner to what would be a convenient port until sometime after performance of the charter party had commenced?

A Yes, certainly.

Q Would you tell us, Mr. Spears, when the fleet that is represented by National -- first of all, how much of a fleet was that, a tanker fleet?

A Pardon?

Q How much of a fleet, a tanker fleet, was National acting as agent for in March of 1971?

A We were operating, I would say, about nine tankers at that time.

Q Of what tonnage, sir?

A About the size of the Oswego Reliance. Some of our tankers were 40,000 dead weight. We had some which were about 50, between 50 and 55, and there was one close to

60,000 dead weight.

Q What would your estimate be of the overall tonnage.

THE COURT: I thought we went into this yesterday before we adjourned.

MR. GILCHRIST: I don't think we brought that out, your Honor.

THE COURT: All right.

A About 400,000 tons.

Q Was that fleet entered in TOVALOP?

A Yes, it was.

Q Do you recall when?

A I know that as of January 1970 all of the tankers we operated were in the TOVALOP scheme. They were all covered by the TOVALOP insurance.

Q Going back to that drydock provision, Mr. Spears, as matters stood on the 23rd was it your understanding from Mr. DeSalvo that it was the owner who was insisting upon the drydocking provision being resolved in accordance with the proforma?

A Yes. The proforma that was sent the first time, it was mailed on the 19th. I believe it was mailed the last day of the weekend before.

(Pause.)

THE COURT: Gentlemen, would you please get on? You should have these conversations before you get into Court. I am not going to twiddle my thumbs here.

MR. GILCHRIST: I was trying to get a stipulation as to an exhibit.

THE COURT: You should have taken it up before you came into court. I told you that in advance.

MR. ESTABROOK: Maybe I can agree to it in a few minutes if he goes ahead with his questioning.

THE COURT: All right.

Q Would you explain to his Honor what the tanker register is, Mr. Spears?

A It is a register of tankers which is published by Clarkson's of London. It is very well known in the trade. I believe that all owners and charterers who are engaged in the tanker trade do have a copy of it and it is important because it has information with regard to the ship's speed and consumption and that information you do not find in the records of the American Bureau of Shipping. I'm sorry, I mean in the Register of the American Bureau of Shipping nor in Lloyds Register.

Q Did you have occasion during the negotiations, Mr. Spears, to make reference to the tanker register?

A I did.

Q In what connection did you do that?

A When I looked over the proforma charter party which was sent to our office and as I looked down on the representations made by the owner of the ship I felt that the ship was presented in a very favorable light. I had my duties as to whether that ship could make that speed and consumption and I therefore, when I cam e to that, looked it up in this register. This was late in the evening of that Tuesday.

Q What did you find when you looked in the register, Mr. Spears?

A I found that the consumption --

MR. ESTABROOK: I object to this, your Honor. This is all hearsay, referring to a book that is not in evidence.

MR. GILCHRIST: I offer it.

MR. ESTABROOK: I object on the ground that it is not accurate.

THE COURT: We will take it as a publication in the trade.

You are offering what?

MR. GILCHRIST: The tanker register for 1970 and I am offering the page in which the Oswego Reliance is listed. I might say in terms of my offer, if it will

reassure counsel at all, I am not offering it for the exact accuracy of everything shown in it but merely for the fact that if you went to this reference manual this is what you would have found.

THE COURT: You would have, if you went to it to look for what?

MR. GILCHRIST: For the vessel's specifications and in particular for her speed and consumption.

THE COURT: Thank you.

Is that a fact?

THE WITNESS: Yes, sir, it is.

THE COURT: Is this a recognized publication?

THE WITNESS: Yes, your Honor, it is.

THE COURT: Well-known in the trade?

THE WITNESS: Very well known.

THE COURT: And used by people in the trade?

THE WITNESS: I believe it is used by everyone that is in the tanker business.

THE COURT: Any objection to receiving this page in evidence?

MR. ESTABROOK: No objection to the page as being a correct copy. I have an objection to the book as not being an accurate book.

THE COURT: We will take it as a publication in the trade at that time used as the witness has testified.

(Defendant Respondents' Exhibit K received in evidence.)

THE COURT: Can I see that page a minute?

MR. GILCHRIST: Do you prefer to see the book, your Honor?

THE COURT: No, the page is all right. Where is the information as to fuel consumption?

MR. GILCHRIST: It is about the third column over. You will see at the top of that page it gives you a guide to the items and reading across, your Honor, first you have "description, flag, call sign," and then "dead weight, draft, owner's managers," and in column 5 "speed, consumption and bunker capacity."

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THE COURT: Can you just put a little check there in pencil so I can see where it is and draw my attention to it?

MR. GILCHRIST: Certainly, your Honor.

THE COURT: What line is that on?

MR. GILCHRIST: Directly across.

THE COURT: Suppose you put a mark on it. I can't see it.

MR. GILCHRIST: Suppose I elicit it through the witness, your Honor.

THE COURT: Yes.

Q When you looked up the Oswego Reliance in the tanker register what did you find there with respect to her speed and fuel consumption and will you take this red pencil, Mr. Spears, --

THE COURT: He has got a pencil which he can use.

A This is not the copy of that --

THE COURT: I can't see it.

A This is not the copy of that from that register. This is something else. I think it has been presented to the Court before.

THE COURT: You gave me a photostat of Lloyd's here.

MR. GILCHRIST: I'm sorry, your Honor. I handed up the wrong thing. I can understand your confusion. Do forgive me.

THE COURT: It is not my confusion. It is your confusion. I was looking for speed and fuel consumption.

MR. GILCHRIST: I grant to be the perpetrator of the confusion.

THE COURT: You plead guilty with an explanation.

MR. GILCHRIST: Yes, sir. Column 5.

THE COURT: Let the witness mark this one.

Q What have you marked, Mr. Spears?

A I have marked the record of speed in knots and the consumption in tons per day of the Oswego Reliance as it appears in Clarkson's Tanker Register.

THE COURT: Let me see it now, please.

THE WITNESS: Yes, sir.

THE COURT: Thank you. Speed is 16.5.

THE WITNESS: 16 and a half knots, your Honor.

THE COURT: That is 16 and a half knots.

THE WITNESS: Right.

THE COURT: And the second item beneath that in column 5 is "consumption, 105," and what looks like "-7F." What does that mean?

THE WITNESS: Fuel. It means 105.7 tons consumption of fuel per day, per 24-hour day steaming.

THE COURT: Is that the same as is stated in the Telex?

THE WITNESS: No, it is not, your Honor.

THE COURT: In what respect does it differ?

THE WITNESS: It differs in that a ship that burns more fuel in steaming becomes a more expensive ship to operate.

THE COURT: The fixing Telex message is with reference to the speed and fuel consumption and reads

"16.5 knots."

THE WITNESS: Yes, sir.

THE COURT: That is the same as in the register of tankers?

THE WITNESS: That is correct, your Honor.

THE COURT: And then it says "On 100 bunker C per day."

THE WITNESS: That is correct.

THE COURT: In that respect it varies from the register of tankers?

THE WITNESS: Yes, sir.

THE COURT: In that in the register of tankers the figure is given at 105.7?

THE WITNESS: That is correct, your Honor.

THE COURT: There is a variance there of 5.7?

THE WITNESS: Yes, about six tons, one might say, per day.

THE COURT: About six tons per day of the fuel?

THE WITNESS: That is correct.

THE COURT: And with relation to the total amount of fuel consumption that is a minimum item, isn't it? It is less than five per cent or a little more than five.

THE WITNESS: I would say it is, your Honor, but there is a relationship between the speed and the consumption.

When the owner represents that his ship will burn 100 tons per day instead of 105 or 106, which is perhaps the ideal, the indication is that he really is not going to be running his ship at 16 and a half knots all the time. In other words, that the average speed of the ship would be reduced somewhat in the course of the performance of the charter.

THE COURT: This provided for a check-up every six months, doesn't it?

THE WITNESS: It does.

THE COURT: Your Telex messages?

THE WITNESS: Yes, it does, your Honor.

THE COURT: Doesn't the fuel consumption depend to some extent upon the head winds that you are running against? How about that? You would have to figure that, would you not?

THE WITNESS: It does in the sense that the ship reduces speed and therefore burns less fuel.

THE COURT: It therefore burns more fuel to keep up a maximum on account of the pressure of the winds?

THE WITNESS: No, not really. When the ship slows down it burns less fuel.

THE COURT: Well, it may be slowing down not because of the speed of the engine which the fuel is being used. It may be slowed down by the winds it runs against.

THE WITNESS: Yes, I see.

THE COURT: The same as the speed may be increased by favorable tides and favorable winds running in the course of the route that you are taking; isn't that so?

THE WITNESS: In a commercial ship this is not the case, your Honor. Maybe a destroyer would in fact continue its speed and buck the weather and burn that, the consumption, but a ship in bad weather will slow down.

THE COURT: You wouldn't call yourself an expert in the operation of a vessel, would you, at sea? You are not an engineer, are you?

THE WITNESS: I'm not an engineer, your Honor, no.

THE COURT: You never worked below decks and never was up on the bridge, were you?

THE WITNESS: I have never commanded a ship.

THE COURT: Never been a chief engineer?

THE WITNESS: No, sir.

THE COURT: Or first mate?

THE WITNESS: No.

THE COURT: Okay. You have no experience as to navigating a tanker or any other ship outside of a sail boat?

THE WITNESS: No.

Let me correct that, if I may.

THE COURT: Yes.

THE WITNESS: I have served on ships as a passenger, however. I have sailed on commercial ships and on tankers as a passenger and I have handled in our organization over the years a number of claims relating to speed and consumption. I have also handled a number of claims relating to damages of ships, for instance, damages to the hull because of bad weather or damages to the boilers of the ship resulting in the ship slowing down. So I have had experience which I don't have actually by directly becoming involved in repairing a ship, but the engineers of our company do report to me regarding these matters, so I do have some experience.

THE COURT: All right.

42 Q Mr. Spears, as a matter of fact you are quite familiar and experienced with the economic aspects, the dollar costs of the differences in speed and bunker consumption as related to each other?

A Yes, I have done extensive work in this particular field.

Q Could you make a projection of what this difference

between the represented consumption in the alleged fixture letter and that shown by the tanker register would amount to over the term of a year?

A Well, that could be computed. There is a relationship between the characteristics of a ship and the representations made by the owner and the time charter rate. Obviously a ship that goes faster will command a higher time charter rate. A ship that has a low fuel consumption versus one that has a higher fuel consumption also commands a better time charter rate.

Q Are you now alluding to the various factors that go into the determination of what is known as world scale?

A Yes.

MR. ESTABROOK: I object to this line of questioning as being speculative.

THE COURT: I am going to permit it.

Q Would you explain what world scale is, Mr. Spears?

A Yes, your Honor. World scale is a freight rate for the carriage of crude oil or petroleum products from one port of loading to one port of discharge. If the ship loads, let us assume, in Saudi Arabia at a port called Rastanura and discharges its cargo in Rotterdam, there is a certain published rate. Say it is

$9 per ton of cargo carriage.

Now, that $9 per ton is equated to being 100 and any changes in the tanker market are reflected as a percentage over or below the 100, so that if it is -- if the rate becomes, let's say, $10 per ton it will not be quoted in the market as $10 but it will be quoted as world scale rate $110 or whatever the equivalent is, say 110. So there is a relationship and the freight rates are quoted daily as being world 100 or world 200 or world 60. That means it is so many points below the basic rate or so many points above the basic rate as a percentage. World scale rate 60 would mean 40 per cent below the basic rate.

Q Mr. Spears, is the consumption of bunkers one of the constituent elements of determining the world scale rate?

A It is not directly, no, sir. A world scale rate is the freight, as I said, for a voyage charterer for a contract of affreightment where you carry so many tons from one place to the other and you are paid so much per ton.

Now, if you hire a ship the ship you have hired is paid on a per month basis. It is like renting a car with a chauffeur, for instance. So you rent the ship

and you have to pay so much per month. Now, what is the relationship between the hire that you pay to the ship and the world scale rate that you could obtain in the market? There are two things that you have to relate, and in relating these two then you take into consideration, of course, the speed and the consumption and the ship's dead weight and its port charges and some certain other data which today is fed into a computer and the computer gives the answer.

The relationship between a time charter payable to a ship per month as related to the cargo -- I'm sorry -- as related to the freight per ton of cargo carried.

This per ton of cargo carried would be on a short voyage or could be on a long voyage.

THE COURT: Have you had enough of this by now? Let's get down to this case.

Q Does that relate in any way, Mr. Spears, to the penalty for under-performance which was filled in in the proforma when it came to you at paragraph 2D of the proforma charter party?

A Yes, it is related.

Q What figure has been placed there?

A 25 cents for each deadweight ton of the vessel for every knot below the speed stated in the charter.

Q And have you made a calculation of whether that is a statistically correct figure for a loss or an under-performance of one knot for this vessel?

A I have done so recently.

Q Is it 25 cents?

A In my calculations it is, depending on the voyage, between 30 cents and 40 cents, not 25 cents per one knot.

Q So far as you were aware, was it pointed out to you by Mr. DeSalvo or was it pointed out to Mr. Theodoracopulos that this was not the strictly mathematical extension of the penalty provision for under-performance?

MR. ESTABROOK: I object to the question. This witness cannot testify what Mr. Theodoracopulos may or may not have heard.

MR. (LCHRIST: He testified that he was in daily touch with Mr. Theodoracopulos about the negotiations and my question was phrased to him "Was he aware."

THE COURT: The objection is overruled. I will allow it.

A Mr. Theodoracopulos did not bring this to my

attention.

Q Mr. DeSalvo didn't mention it to you either, did he?

A He didn't.

Q And in the same connection --

THE COURT: That disposes of that line.

Let me ask a question here and get back on the beat.

In this exchange of Telex messages there is the phrase "performance review every six months."

THE WITNESS: Yes.

THE COURT: Is that a usual provision?

THE WITNESS: It is a standard provision in this charter with a blank to be filled in -- with two blanks to be filled in. One is "How often would this review take place?"

In this particular place it was agreed "six months," and then there is a provision as to the indemnity to be paid to the charterer in the event the ship doesn't perform. The first part was agreed upon at the time of this Telex. The second part was not mentioned.

THE COURT: Could you mention the second part until you have seen the performance?

THE WITNESS: The performance of the ship, your Honor?

THE COURT: Yes. Wasn't there a means of ascertaining the second part, that would be the penalty or reimbursement?

THE WITNESS: There could have been.

THE COURT: THat could be accomplished and could be found out by feeding this data to that little computer that you told us about?

THE WITNESS: Yes, your Honor. In some cases and in all the charter parties the owner -- I'm sorry -- the charterer presents its case and tries to prove that the ship did not perform and then there was a negotiation as to the compensation and you would --

43 THE COURT: You would come to the compensation by feeding all this information into your computer, wouldn't you?

THE WITNESS: You could have, your Honor, but--

THE COURT: And you couldn't get that penalty, the amount of that penalty until you had a performance record, could you?

THE WITNESS: You could, yes.

THE COURT: The quantity, how much it sells short?

THE WITNESS: There are many variables that you put in the computer. There can be arguments as to what does go in or what doesn't, so to prevent these arguments, both parties agree in the event the ship doesn't perform, this is going to be it.

THE COURT: You can't do that until you know the extent of its failure to perform, can you?

THE WITNESS: Yes, you do. In this particular case you would always put a pre-agreed amount if the ship doesn't perform. That would be the damages, the maximum damages that you could claim.

THE COURT: But where there is no agreement fixed there is a means of finding this out by looking at the speed and looking at the knots that the ship travels?

THE WITNESS: THat is correct, your Honor.

THE COURT: Looking at the fuel consumption?

THE WITNESS: Yes, your Honor.

THE COURT: Okay. That could be easily computed and quickly?

THE WITNESS: It could be easily computed, but there could be disagreements as to the data which is fed to the machine.

THE COURT: That could be determined by

examination of the log of the ship, couldn't it?

THE WITNESS: Not necessarily.

THE COURT: Wouldn't the log of the ship show how many knots it travelled each day?

THE WITNESS: Yes, it would.

THE COURT: Wouldn't the log of the ship show how much was drawn out of the fuel tank?

THE WITNESS: Yes, it would. Sometimes it is difficult to pin this down.

THE COURT: No further questions from me.

Q Was the 25-cent figure that was entered at this blank discussed at the negotiations?

A No, it was not.

Q Isn't this related to the additions that have been made to the proforma relating to the Beaufort scale at page 1 and also page 2, in any event, to the addition --

Do you have my question, Mr. Spears?

A Yes, sir, I do. It is related. The ship's performance is determined in certain weather conditions. Generally charter parties provide for moderate weather. In other words, the ship is expected to make a certain speed in moderate weather and consume a certain amount of bunkers per day, so it becomes important as to what

stipulation is made to define moderate weather.

THE COURT: Didn't you tell me a few minutes ago that the Beaufort scale, which is the scale of the wind that you are heading into, that that would have no bearing upon the fuel consumption; didn't you say that only a few minutes ago?

THE WITNESS: I said, your Honor --

THE COURT: Isn't that the testimony? Didn't you give testimony a few minutes ago that is just exactly contrary to what you are saying?

A I don't believe I did. If I did, I didn't meanit that way. What I mean is that -- I think this is quite well-known in the trade -- that if there is bad weather the ship slows down and when the ship slows down the ship burns less bunkers. But what is important is the loss of time because the cost of bunkers is an insignificant cost as compared to the charter hire paid to the ship. So if the ship loses one day in this case I don't know what it could come to, but I would say maybe it is something like $6,000 or $7,000.

THE COURT: Isn't the speed of the ship determined to some extent by reason of its load that it is carrying and its line in the water?

THE WITNESS: YEs, most definitely.

THE COURT: If there is an overriding of the plimpsol line doesn't that slow down the speed of the ship?

THE WITNESS: Yes, your Honor.

Q Doesn't the amount of penalty that you may recover for under-performance in relation to the represented speed and consumption, is that not affected by how you define moderate weather in terms of the Beaufort scale?

THE WITNESS: Yes, indeed. Usually these claims are handled --

THE COURT: Just answer my question.

THE WITNESS: You take the ship's log and you check it day by day. You exclude those days where the weather has been particularly bad. In other words, in this case we would take Beaufort 5 or Beaufort 6, whatever the charter party provides, and as we go down the ship's logs we see, for instance, in 24 hours it made, let's say, 16-knot speed and next to it are the weather conditions, the force of the wind. The captain would say "wind Beaufort 5", let's say. Well, now, then that day is taken into consideration and in making our calculations if the captain says Beaufort Scale 7, that day is excluded. It is not taken into consideration because

the ship is allowed in the very bad weather to slow down as a matter of safety to the ship.

In trying to determine whether there is a claim against the owner for non-performance as far as the ship's speed is concerned, one takes out of the log book those days where the weather was not too bad, let's say where there was no gale or no heavy weather, and then looks at that to see whether the ship was able to perform as represented in the charter.

Q Mr. Spears, prior to your receipt of the pro forma had there been any agreement to these additions respecting the Beaufort scale?

A Actually there had been two additions to the charter party. There has been no discussion about it whatsoever. In the first place, as you pointed out, there is a determination that moderate weather means maximum Beaufort Scale 5. This is not always so. Also there is an addition here to the charter party where it says that we take into consideration the average speed loaded and light in moderate weather. This has been added to the beginning of clause 1 without my knowledge or without my consent.

Q Still with Exhibit E, Mr. Spears, there is hand-writing appearing on page 2 and on page 4 and I ask you

if you recognize the handwriting?

A Yes, this is the handwriting of Mr. Harry Theodoracopulos.

b44

Q And there is also handwriting on the last page. Can you identify that handwriting?

A Yes, this is the handwriting of Mr. Jerry George, who is the manager of insurance and claims department. I suppose these notes were made at some subsequent date. Jerry George's notation here was made on a subsequent date.

Q Mr. Spears, after you sent Petitioner's Exhibit 5, the telex in which you confirmed that negotiations had been broken off, did you receive a telex in reply from Interocean?

A Yes, I did.

MR. GILCHRIST: I ask that this be marked as Respondents' Exhibit L.

xx

(Defendant Respondents' Exhibit L was marked for identification.)

Q Is that a copy of the telex that you received?

A Yes.

MR. GILCHRIST: I ask that that be marked in evidence, your Honor, as Respondent's Exhibit L.

I might add, your Honor, that this same telex

was Exhibit D to the petition to compel arbitration.

MR. ESTABROOK: This actually was received from Poten, was it not?

MR. GILCHRIST: It is signed "Interocean."

MR. ESTABROOK: The first line is: "TWX message just received from owners."

It is signed "Poten Partners."

THE COURT: Isn't this exhibit in evidence?

MR. ESTABROOK: I believe it is part of the pleadings, your Honor. I am just trying to be sure.

THE COURT: This is, as I recall it, a telex message which was sent by Poten addressed to National Shipping reciting the telex that they had received from National Shipping and Hellenic and asking them to desist from further negotiations, and they quote it exactly, as I remember. It begins: "We quote herewith a telex message we received from National to us reading as follows," doesn't it?

MR. ESTABROOK: No, your Honor. This is a message Mr. Gilchrist has shown me.

THE COURT: Let me see it.

We haven't got this in evidence.

MR. GILCHRIST: It is not in evidence yet.

THE COURT: I thought this was the one --

MR. GILCHRIST: It is the reply, your Honor.

MR. ESTABROOK: May I be heard, please?

THE COURT: This is not the one. This is in response to the one that Poten sent.

MR. ESTABROOK: I have no objection to this going into evidence as a message that Mr. Spears received from Poten and Partners quoting a message that Poten had in turn received from Interocean.

MR. GILCHRIST: No quarrel there, your Honor.

THE COURT: Received in evidence, then.

(Defendant REspondents' Exhibit L was received in evidence.)

THE COURT: All right.

Q Did you send a reply to Respondents' Exhibit L?

A Yes, I did.

MR. GILCHRIST: Would you mark this as Respondents' Exhibit M?

(Respondents' Exhibit M was marked for identification.)

Q Is this the reply that was sent to L?

A Yes.

MR. GILCHRIST: I offer it in evidence, your Honor.

MR. ESTABROOK: No objection.

THE COURT: Received in evidence by consent.

xx

(Respondents' Exhibit M was received in evidence.)

MR. GILCHRIST: Your Honor, that completes our direct of Mr. Spears.

CROSS EXAMINATION

BY MR. ESTABROOK:

Q Mr. Spears, I notice you say in Exhibit M that you have passed on the contents of Interocean's message to your principals; is that correct?

A Yes, sir.

Q Who were your principals?

A Mr. John Theodoracopulos.

Q How did you pass it on?

A I had been in contact with Mr. John Theodoracopulos.

Q Did you pass it on by telephone?

A By telephone.

Q Person-to-person?

A By telephone.

Q Where was he?

A In Athens, Greece.

Q Do you have a note of your telephone conversation?

A I called Mr. Theodoracopulos in the afternoon of Tuesday the 23rd and I told him that we have a problem, and he called me back the next day, I think, or the day after. But he had been in contact with me since this problem

came up.

Q Do you have notes of these telephone conversations?

A No.

Q You are testifying entirely from recollection; is that correct?

A Yes, that is correct.

Q And so every time you say passed this on to your principal you mean Mr. John Theodoracopulos?

A That is correct.

Q When you first received from Mr. Harry Theodoracopulos the so-called fixture telex --

MR. GILCHRIST: Excuse me. The testimony was that he took the telex off the machine at the offices and brought it to Mr. Theodoracopulos.

Q Did you take it from the machine or did a clerk take it from the machine?

A Somebody took it from a machine and brought it to my office.

MR. GILCHRIST: I stand corrected.

Q Did you read it with Mr. Harry Theodoracopulos or did you read it by yourself?

A I read it by myself.

Q The first line was:

"Confirm having fixed today for your account as

follows:"

Was that clear to you?

A It is cleasr what it says, yes.

Q And as an experienced chartering man thoroughly familiar with the English language what does that mean?

A It means what it says. It means that -- "fixed today" means that we have fixed today.

Q "Owner Interocean Shipping Company."

Is that clear?

A That is clear.

Q When you referred to Clarkson's book the owner was Oswego Ore Transport, wasn't it?

A What I know is the name of the ship and Bethlehem Steel was one of its subsidiaries. Whatever the name was at the time was not material. It didn't make a bit of difference to me.

Q The name of the owner is Interocean, isn't it, in this case?

A It is, yes.

Q So the phrase Oswego Ore Transport must be a mistake; isn't that correct?

A No, I didn'tpay any attention to it. It is the name of the ship that is important and the principal that you are dealing with.

Q Now then: "Charterer Hellenic International Shipping S.A. of Panama."

That was clear, wasn't it?

A Yes.

Q That is a company the principal of which through an intervening corporation is a Mr. John Theodoracopulos; isn't that correct?

A That is correct.

Q And National Shipping & Trading had been representing that company in New York; isn't that correct?

A That is correct.

Q And did the company have any substantial office of its own?

A Which company?

Q Hellenic International Shipping, S.A. of Panama. Or was the principal office care of National Shipping?

A Its principal office, I would say is care of Hellenic Shipping & Industries Company Limited in Piraeus, Greece, but --

Q But we represent the company. The company did own a ship at one time and we were operating -- by "we" I mean National Shipping.

Q In 1968 it did own a ship?

A It did own a ship at one time.

Q When it operated that ship it operated through National Shipping as agent; is that correct?

A Yes.

Q Lloyd's listed its address care of National Shipping & Trading in New York; is that right?

A It could be.

Q Is there any doubt in your mind?

A I haven't looked that point up in Lloyd's, but I am not surprised at all.

Q For the purpose of refreshing your recollection, then, I show you this and ask you if this refreshes your recollection.

A That is the case. I didn't look it up. It didn't matter to me to look it up in the register.

Q "Subsidiary of National Shipping & Trading with appropriate letter of guarantee."

Is that clear to you?

A No, it isn't.

Q Is the word "Subsidiary" correct or incorrect?

A The word "Subsidiary" -- this way Hellenic International is not a subsidiary of National Shipping.

Q But the word subsidiary is clear to you, is it not?

A It is.

Q What about the phrase "with the appropriate letter of guarantee." Is that clear to you?

A I don't understand what you mean by clear. I understand the language.

Q You understand the language?

A Yes.

Q It is true, is it not, that Hellenic International Shipping S.A. had provided guarantees for its performance of other charters; isn't that correct?

A Hellenic -- say that again, please.

Q Hellenic International Shipping S.A. of Panama had when it chartered other ships provided guarantees of its performance by others?

A By others?

Q Yes.

A It has, yes.

Q And so it was clear to you that another owner might want a guarantee from Hellenic International Shipping; isn't that correct?

A Do I conclude that because we have done in one case -- no, this is not correct at all because in the previous case the owner was doing the financing and the financial institutions required the guarantee of someone of substance to support that the charter hire would be paid to the owner of the ship. It is an entirely different

case.

Q In that connection it is true, is it not, that the charter was in turn assigned to a financial institution?

A I'm sorry. I would like to get this thing clear in my mind. You are talking now about another ship that is called the Persian Commander; is that correct?

Q That is correct.

A There was a charter party between Hellenic International and an owner of the ship, Persian Commander.

Q Yes.

A Okay. The owner of the ship Persian Commander relied on the income of this charter which it had with Hellenic International in order to assign that income and pledged as collateral to a bank to raise the money that it needed for I don't know what purpose -- for making a loan.

Q Isn't it true that Hellenic International also pledged a sub charter it had to a bank?

A That is correct.

Q So Hellenic International did not have, as I gather in 1970, too many assets of its own; is that correct?

A This is entirely incorrect. Hellenic International is a very, very strong company financially.

Q But it is clear, is it not, that the fixture telex provided for a letter of guarantee from National Shipping & Trading?

A I don't agree with that.

Q What does the phrase "subsidiary with National Shipping & Trading with appropirate letter of guarantee" mean to you?

A First of all, it is not a subsidiary.

Q First of all, that is a mistake of fact, is it?

A That is a mistake of fact.

Q The correct word should have been affiliate; isn't that right?

A Now, I can't redefine the word affiliate for you. Generally in a very broad sense you might call it an affiliate, but it isn't really because you don't have the same stockholders in one case as in the other.

Q You disagree with the words subsidiary as being wrong?

A Yes.

Q However, it is clear, is it not?

A The word subsidiary is clear.

Q "With appropriate letter of guarantee" means that National Shipping & Trading was supposed to provide a letter of guarantee; is that not correct?

A This was my understanding, but it isn't clear.

Q But it was your understanding?

A It was my understanding that Bethlehem Steel or the owners, I should say, wanted a guarantee of National Shipping & Trading Corporation.

Q The words "Oswego Reliance" is clear, the name of the ship?

A Yes.

Q The description of the ship, 49,283 DWT 39 feet 5/8 inches draft, cubic 98 per cent, 1,968,842. That was clear, was it not?

A Yes, it was clear.

Q Three pumps , 1300 TWPH each. That is clear, is it not?

A That is clear.

Q 16.5 knots on 100 Bunker C per day. That is clear, is it not?

A That is not clear.

Q Is the 16.5 knots clear?

A Yes.

Q Is the 100 Bunker C per day clear?

A Yes.

Q Now, the 16.5 knots you confirmed in the tanker registry, did you not ?

A I confirmed it -- I would like to have the sequence of events. I would like you to tell me what date you are referring to.

Q Of course. On March 17, 1971.

A On March 17, 1971 I did not look up that register.

Q When did you look up the register?

A I looked it up in the evening of the next Tuesday, which I believe was the 23rd.

Q When you looked it up you found the 16.5 knots was confirmed, did you not?

A What was confirmed in it was the register -- the 16.5 knots is in the register.

Q However, you did find on Tuesday, I believe you testified, that the 100 Bunker C was not in the register; is that correct?

A That is correct.

Q What does the charter party provide for on over consumption?

A It provides that the additional consumption will be paid for separately. In other words, that the charter will be compensated for the extra consumption of fuel.

Q You made a comment on the fact that you were going to use for thepurposes of the guarantee the maximum

Beaufort Scale 5; isn't that correct? Referring to the pro forma charter.

A I say that the broker and possibly the owner of the ship have put that condition in the charter party without bringing it to our attention and I say further that this particular broker on the ship that you mentioned before, on the Persian Commander, had stated in the same exact form of charter, Mobil time charter, Beaufort 6.

Q That is right.

A So, therefore, there was a question as to what would be acceptable. It was a question open for further negotiations.

Q Did you bring that to anybody's attention at the time?

A No.

Q By the way, in the prior charter where they guaranteed 15 knots they stated it would be 17 cents per ton for each knot deficiency in speed?

A Yes. The ship had much to do with it and I think thatyou see if the ship has a deficiency in speed it would depend very much on the market rate.

You have not understood how one arrives at these things.

Q Now, delivery and redelivery PG excluding Fao and

Abadan. That was clear?

A That is clear.

Q Laycan March 31/April 15, 1971 ETA April 1, 1971. That is clear, is it not?

A That is clear.

Q Crude and/or DPP maximum three grades within natural segregations. That is clear?

A That is clear.

Q Maintaining heating 135 degrees fahrenheit. Clear?

A That particular phrase is clear, yes.

Q Coiled wing tanks only?

A That was not clear.

Q Did you make any objection to it?

A No. I discussed it with Mr. Theodoracopulos. I was nottalking with the broker at the time.

Q But you yourself did not take it up with anybody except Mr. Theodoracopulos?

A That is correct.

Q Trading worldwide within IWL excluding communist communist controlled China, North Vietnam, North Korea, Cuba. Was that clear?

A That is clear.

Q Period one year plus or minus 30 days.

Is that clear?

A That is clear.

Q Mobil time excluding clauses 9, 12AII, 12BII, 12BIII. Is that clear?

A No, not at all.

Q Did you look at the Mobil form charter?

A Except that I understand the language, I didn't know what it really meant.

Q When you came down to overtime and petties $750 per month, did that make that clear?

A Yes, that is quite clear.

Q That cleared up your cancellation of clauses 12AII, 12BII and 12BIII?

A No, it didn't.

Q I show you Exhibit D and call your attention to clause 12, Mr. Spears.

A Yes, sir. If this is the same -- may I read the original? It might be a little clearer.

Q Of course.

A I am not sure that these are the same.

Q As long as it is a Mobil time charter.

A Yes. You are referring to which clause?

Q Clause No. 12. 12A provides for the owner to provide and pay for provisions, supply deck and engines,

stores, galley and cab stores, all P & P insurance of vessel; right?

A Yes.

Q Wages, master, officers and crew, consular fees and certain other items.

12B says: Charterer will pay for the fuel and certain other charges, and 12BII provides for telephone calls and messages, cables.

A Excuse me, please. I would like to ask you again what were the second reference you gave me?

Q 12B, which provides for the charterer to pay for all fuel and certain operating expenses. Isn't that correct?

A That is correct.

Q That is BI. BII provides for charterer to pay for telephone calls, radio messages, et cetera. Isn't that correct?

A That is correct.

Q That was eliminated by the telex, was it not? 12BII?

A Yes.

Q 12AII provides for owners to pay for galley coal; right?

A That is correct.

Q 12BIII provides for overtime, does it not?

A 12BIII?

Q Provides for overtime?

A Excuse me. Let me find it, please. 12BIII, all over time, that is correct, yes.

Q Those three clauses, in other words, the galley fuel, the cables and telephone calls and the overtime were eliminated, isn't that correct, according to the telex?

A Yes.

Q And the telex later provided for petties and overtime at $750 per month, did it not?

A That is correct.

Q So taken together those two clauses are clear, are they not?

A Yes, they are.

Q Suitable drydock clauses to be worked out for November drydocking about 15 days with proper notice. Is that clear?

A Suitable -- this requires drydocking -- I'm sorry. Would you please tell me exactly --

Q This is in the telex message, sir.

A I'm sorry.

Q It is not in the charter: "Suitable drydock clause to be worked out for November drydocking about 15 days

with proper notices."

Is that clear to you?

A That is clear.

Q Performance review every six months. Is that clear?

A That is clear.

Q Rate $5.60 per deadweight ton per month payable in U.S. dollars in New York. Is that clear?

A That is clear.

Q Is it not true, sir, that in March of 1971 the tanker market, particularly the spot market out of the Persian Gulf, fell drastically in the week between March 19th and March 26th?

A I don't think so.

Q You testified, I believe, that you were quite worried about the market on March 23rd.

A That is not correct. I'm sorry. You missed my point, then. I said that I was concerned about the ship arriving in the beginning of the following week. We had not concluded this charter. We had to conclude the sub charter and give instructions to the captain by the end of that week, when it appeared that the spot market in the Persian Gulf showed a weakness. This happens from time to time. It doesn't mean that the market is going to

collapse. But if I didn't do that I would not have made a counter offer on the 23rd.

Q Are you familiar with the Charles I. Weber Company?

A I know of them.

47 Q Do you receive their reports?

A I think we received them only recently. We did not receive them -- I don't believe we received them in 1971, but we do receive reports from other brokers.

Q Do you receive maritime research reports?

A No.

Q Do you read the Journal of Commerce?

A Yes, I do.

Q Did you know that the fixture of the vessel was reported in the Journal of Commerce Monday, March 22nd?

A I didn't know.

Q You made no note of that?

A I don't remember reading in the Journal of Commerce that the ship was fixed.

Q The Mobil time charter was published in 1967, was it not?

A I believe it was.

Q That was before TOVALOP was formed, was it not?

A That is correct.

Q Now, TOVALOP has coverage to $14,400,000, does it not, maximum?

A I'm not sure of this. How much did you say?

Q $14,400,000.

A Yes, it could be.

Q Do you have any opinion as to how much disaster coverage a tanker should have?

A No, I don't.

Q Do you believe that the 35 million that Mr. Kelley testified to is adequate?

A I'm not in a position to appraise this. I really don't know. The liability for oil pollution could be a tremendous liability. I am not an expert on insurance.

Q Do you know how much insurance you carry on your tankers?

A They are insured without any limitation of liability. As far as this type of liability, there is no limitation. As far as the hull policy, that is something else. They are insured for the value of the ship.

Q You do not claim 35 million is inadequate, do you?

A I am not in a position to judge that.

Q Did Mr. Theodoracopulos explain to you that he wanted a reply by 4:55 on the 17th?

A As I mentioned, I was away from the office and when I came back he told me that he had agreed on certain particulars. He had a ship in hand, he told me, and he had agreed on certain things and it was subject to detail. That is what he told me. I don't remember -- I think when I came back it must have been about 4:30 or maybe a quarter to 5, thereabouts.

Q So he didn't discuss the time with you. He said this has been accomplished; is that what he did? He discussed what he had done?

A Yes. He said "This is what I have done," yes.

MR. ESTABROOK: That is all.

THE COURT: Any redirect?

MR. GILCHRIST: May I have Exhibit 2?

REDIRECT EXAMINATION

BY MR. GILCHRIST:

Q Mr. Spears, when you were answering Mr. Estabrook's questions on the llnaguage of Petitioner's Exhibit 2 and he was asking you whether something was clear, you were saying it was clear as a matter of English what it said; correct?

A Excuse me. Let me get Exhibit 2.

Q I show you the exhibit.

A Yes; that is the telex, yes. That is right.

Q Could you tell us from the language here what

exactly the drydock provision was going to be?

THE COURT: Please. He has already testified on that on his direct testimony. We have already been over that, haven't we?

MR. GILCHRIST: I will withdraw the question.

Q To your knowledge, Mr. Spears, did National report a fixture having been made to anyone?

A No, it did not.

MR. GILCHRIST: I have no more, your Honor.

THE COURT: All right.

MR. ESTABROOK: Thank you, Mr. Spears.

(Witness excused.)

MR. ESTABROOK: At this time, your Honor, I would like to offer Exhibit 1 in evidence. It has been marked for identification and has been used extensively, but I neglected to offer it in evidence.

MR. GILCHRIST: I have no objection.

THE COURT: Received in evidence.

(Plaintiff Petitioner's Exhibit 1 was received in evidence.)

THE COURT: Is that the case? No more evidence for either side?

MR. GILCHRIST: I have one more witness, your Honor, but I understood from Mr. Estabrook that Mr. Gorrissen

is now here and that he intended to put Mr. Gorrissen on.

MR. ESTABROOK: If you don't mind my breaking in I would just as soon put him on.

THE COURT: How long is he going to be?

MR. ESTABROOK: About fifteen minutes, your Honor.

THE COURT: Very well.

MR. ESTABROOK: Thank you, your Honor.

W I L L Y G O R R I S S E N, called as a witness in behalf of the petitioner, after having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ESTABROOK:

Q Mr. Gorrissen, what is your business?

A I am a ship broker.

Q Where is your office?

A 1301 Avenue of the Americas.

Q What is your firm?

A Jones & Gorrissen.

Q How long have you been a ship broker?

A The better part of my life.

Q You are obviously 21, buthow long is that?

A I have been in shipping for about 45 years, not always as a ship broker but at times as a principal.

Q How much experience have you had in the brokerage of tankers?

A I have done almost exclusively tankers for the last 12, 15 years.

Q Have you had business with Bethlehem?

A Yes, I have.

Q Have you had business with Mr. Theodoracopulos?

A I believe we have had some, but I don't --

it is a long time ago.

Q Are you familiar with the Oswego Reliance, a combination oil and ore carrier of about 50,000 tons?

A I am.

Q Are you familiar with the TOVALOP as it was in 1971?

A Yes.

Q In 1971 can you tell me what the status of TOVALOP was in the tanker market?

A It was originally organized in 1969, as far as I recall, but most companies did not adopt it until some time in 1971 and in 1971 there were several oil companies that didn't have it and didn't insist on owners being members. There were several oil companies that insist that owners be members.

Q Was there any universal custom in 1971 as to who should pay for the TOVALOP?

A The oil companies was insisting, to the best of my recollection, that the owners had to pay for it.

Q What was British Petroleum doing in 1971?

A British Petroleum sent out a circular in 1971 referring to the organization of TOVALOP in 1969 and spelled out pretty clearly in the memorandum how it was going to be handled and who was going to pay for it.

Q Is this a copy of the memorandum? I am showing the witness Exhibit 8 for identification.

A Yes, it is.

Q In fact, this was originally addressed to you, was it not?

A Well, it is a circular that John I. Jacobs in London sent out and that particular copy has my initials on it.

Q This was received by you on what date?

A May 17,1971.

Q Is this one of the documents you considered in reaching your opinion as to the status of TOVALOP?

A Yes.

MR. ESTABROOK: I offer this in evidence.

THE COURT: I don't see the relevance of this at all.

MR. GILCHRIST: Not only do I not see the relevance, your Honor, but this was received, so the staff indicates here -- first of all it is dated May 7, 1971 and received May 17, 1971, so I don't think it is admissible.

THE COURT: The objection is sustained. The Telex does not mention TOVALOP. The Mobil time charter does not mention it, and you have offered evidence,

that the plaintiff owner was self-insured.

Q Mr. Gorrissen, we are discussing a time charter of a 50,000 ton tanker for one year in the Mobil time form which was fixed by an exchange of telex messages. I am going to ask you about one phrase: "Mobile time excluding clauses 9 ... suitable drydock clause to be worked out for November drydocking about 15 days with proper notices."

Is that clear to you?

A Yes.

Q What does it mean in lay language?

A It means that a clause will be worked out that is suitable to both parties and covering where and when the ship is going to drydock.

Q When would that be worked out in your understanding of the chartering business?

A Well, it usually is worked out before the charter party is signed and it is quite common that it is considered a detail where the broker, quite often he puts his wording that he thinks is beneficial to both parties in there and it is my opinion that it is not considered a big, difficult clause.

Q Is this one of the major features of the charter?

A I wouldn't say so.

MR. ESTABROOK: You may examine.

CROSS EXAMINATION

BY MR. GILCHRIST:

Q Mr. Gorrissen, in terms of earning higher rates on spot chartering, what is the best season of the year?

A Historically it used to be the winter season, but it hasn't worked out that way the last few years. But historically people thought of it that way.

Q Wouldn't you agree that most charterers in the market think that their best opportunities lie in the winter season?

A Yes, they probably would think so.

Q And generally if the matter of a drydocking is going to be pinned down, wouldn't you expect to have a much easier time if he drydocking were proposed for, say, May to August than if it were placed in November, December or January? Wouldn't you expect much less of a hassle over such a provision?

A Well, I frankly have never had any hassle over a drydocking clause, so it is hard for me to --

THE COURT: I think it is problematical. I think we have enough on this.

MR. GILCHRIST: I do have more cross on this point, your Honor.

THE COURT: Go ahead, ask questions.

Q Let us suppose that this drydocking, this suitable drydocking provision that was mentioned in what you were told was a fixture letter proved upon inquiry to provide that the charterer would guarantee to the owner that the owner could drydock for 15 days in November at Spain, Portugal or Japan. Would you think maybe that was a major provision?

A No, I personally would not think it is a major provision, sir.

Q Mr. Gorrissen, if the owner directed the charterer to proceed to Japan for a 15-day drydocking, wouldn't that affect the trading limits of the vessel for the period involved in proceeding to Japan and drydocking and returning to where there was business?

A Did you say for the owners to instruct the ship to --

THE COURT: If it was a ship operating in the --

THE WITNESS: It is the charterer who decides where the ship is going to go, not the owners.

Q If the drydocking clause, Mr. Gorrissen, gives the owner the right of a guarantee to direct that charterer to go to Spain or Portugal or Japan for 15 days in November, then it is the owner who is determining where

the ship is going to be employed then, isn't it?

A No, sir, because the owner -- the major trade for ships of this size is PG to continent or PG to Japan and the charterer, the way I understand you, and I had nothing to do with the charter party, the way I understand is that the charterer can let the owner drydock the ship either on the continent or in Japan.

Q What do you understand, again?

A The way I understood you, the charterer would give the owner the right to drydock the ship on either the continent or Japan; that therefore it is completely up to the charterers where they want to send their ship.

Q You didn't understand, Mr. Gorrissen, that it is the owner's privilege under that drydocking clause --

THE COURT: To pick out the place.

Q -- to direct the charterer to go to either Spain or Portugal or to Japan for 15 days drydocking in November? Does that change your answer?

A In other words, it is the owner who can --

THE COURT: The owner can send it from Kobe or to the Persian Gulf or one of the Iberian Peninsula countries.

A I have never heard of a drydocking clause that is that way.

Q The testimony here is that that is what was proposed in the pro forma that was sent over following this alleged fixture letter.

MR. ESTABROOK: I object to the question as not being a proper summary of the testimony.

THE COURT: I think that is a fair inference. We can all draw our conclusions. We know the location of Kobe. We know the location of the Iberian Peninsula and of the Persian Gulf. Obviously if the ship goes to Kobe in Japan for 15 days drydocking it has to be kept out of the Mediterranean and it is going to be laid up for a long period of time while it journeys over to Japan and back.

Am I correct?

THE WITNESS: I'm sorry, sir. I didn't quite follow you there because --

THE COURT: All right.

THE WITNESS: I'm sorry. I --

THE COURT: All right.

Q You understand, Mr. Gorrissen, that your testimony is being offered as an expert on the tanker trade. Do you understand that?

A Yes.

Q And you were posed a hypothetical by counsel

here as to whether you felt that was -- to be exact, because I don't want you to be confused, the question posed to you on your direct was whether, and I quote now "Suitable drydock clause to be worked out for November drydocking about 15 days with proper notices" was in your opinion a major provision of a charter and you answered you did not regard it as a major provision. Now, I ask you to assume a further assumption.

THE COURT: He said he did not just because that is generally left to the charterer to determine.

Am I correct?

THE WITNESS: That is right.

MR. GILCHRIST: I heared him sa saying "I didn't think it was a major provision."

THE COURT: He gave you the reason why in his opinion it is left to the charterer to determine. That was his testimony.

THE WITNESS: If I may say something, I have yet to experience personally any charter party to fall apart because of the wording of a drydocking clause. I have never had that experience.

Q I understand that you have neverhad that experience, Mr. Gorrissen, and maybe that is why you were having trouble understanding what I am trying to get at.

MR. ESTABROOK: I object to that.

THE COURT: The man has said that it is left to the charterer and they have been able to work it out.

MR. GILCHRIST: This is a completely different situation and I want to bring that out.

THE COURT: You don't bring it out through an expert. That is brought out by the testimony and by the telex.

MR. GILCHRIST: May I continue with my cross examination?

THE COURT: Yes.

Q I ask you to assume that when the pro forma arrives at the charterer's desk the actual drydock provisions as is set forth in this exhibit E adds additional typewritten language to clause 11B. Will you read that, sir?

A Yes.

Q My first question, Mr. Gorrissen, is: Your 12 years as a tanker broker ever seen such a clause?

A I have seen maybe not exactly that wording, but I have seen certain clauses very similar to that, with this clause. I would interpret that this is the charterers who have the right to send the ship to Portugal, Spain and Japan and the owner drydocks the ship wherever the ship is going, to one of those three countries.

Q That is your understanding?

A Yes. It says right here "Charterer guarantees to place the vessel in position of drydock in any one of these countries." That means the ship can go -- my opinion that the charterer would fix it in Japan, Portugal or Spain or close to there and that is where the owners will drydock the vessel.

Q I will go with your interpretation, Mr. Gorrissen. You are operating this vessel, let's say.

A Right.

Q And how do you program her for the month of November?

A How you program it?

Q Yes.

A If I was the operator I would work the market and fix it for a cargo out where you have the biggest profit, either to Spain or to Portugal or Japan, depending on the market conditions at that time.

Q Suppose that you did have -- would you repeat that?

THE COURT: He made it plain and I think your own witnesses testified to the same.

You took the ship on routes or on bridges which are going to bring the biggest return.

Q Do you necessarily get the biggest return, Mr. Gorrissen, on the booking of the ship to the Mediterranean?

A Dependingon the market condition at that time. I couldn't tell you htere what the market conditions would be in November of 1971, but, for example, you can go to the Mediterranean. You can get the cargo out of the Mediterranean for the U.S. and have your ballast back to the Persian Gulf. It depends on the market looking for a ship or market conditions.

Q How, for example, would you work in a profitable piece of business for the Caribbean trade if you had to go to either Japan or Spain or Portugal?

A From the Carribbean you can take a transatlantic cargo to Portugal, Spain or to the continent.

Q Are you taking into account the amount of ballast days you would lose?

A The world scale that you get paid for the oil companies is based on a world scale -- generally speaking,is based on the turnings in ballast to the original loading port.

Q But you have a vessel on a one-year time charter, Mr. Gorrissen, and you have to go out and spot in the best months the most profitable business you can do to pay your time charter higher and hopefully make a

profit. Wouldn't you agree with me that if you have to spot one piece of business in order to get into position for Spain or Japan alternatively and then spot other business afterwards that you are very likely going to have many more ballast legs than two separate spot charterers will take account for in their calculation of world scale?

THE COURT: That is not a question. It is a statement, an argument. It is improper in that form and not the proper subject for cross examination of this witness.

The objection is sustained.

If you are going to be much longer, we are going to excuse the witness. I have people waiting upstairs. I told you I would adjourn at half-past three today. It is now ten minutes to four.

MR. GILCHRIST: I do have more questioning, your Honor.

THE COURT: You want this man back and we will have to bring him back.

MR. GILCHRIST: I also have a witness.

THE COURT: I am going to give you another day for that. I told you that.

MR. GILCHRIST: All right, sir. I would like to continue with Mr. Gorrissen.

THE COURT: I will have to put it over. I will have to get in touch with you. You will have to get your proposed findings of fact and conclusions of law, get your minutes and you can work on your briefs in the meantime.

I will get my law clerk to call you both up.

MR. ESTABROOK: Thank you, your Honor.

(Trial adjourned without date.)

Interocean Shipping Co.

v. 71 Civ. 3363

National Shipping & Trading Corp., etc.

New York, May 2, 1973
Room 110 - 11:00 a.m.

- -

(Trial continued.)

- - -

THE COURT: This is acontinued trial, Interocean Shipping Company versus National Shipping & Trading Corporation and Hellenic International Shipping, S.A.

You may continue with the witness, Mr. Gilchrist.

W I L L Y G O R R I S S E N, having been previously duly sworn, testified further as follows:

CROSS EXAMINATION

BY MR. GILCHRIST (Continued):

THE CLERK: May I remind you you are still under oath.

Q Mr. Gorrissen, isn't it a fact that if you had to program the Oswego Reliance during the month of November eith-r to Spain, Portugal or to Japan for 15 days drydocking that this would affect the trading range of the vessel for that month?

A Let's see, if I understand you correctly you are trying to say that the charterers could not send the ship to any other area and thereby restricting the trading range; is that what you are saying?

Q Yes.

A Yes, they will be restricted to those two directions.

Q That has a material effect on the vessel's trading range, does it not?

A On the range to a certain extent, but I would not say that it has a great effect on the market value because these are two main directions that oil moves out of the Persian Gulf either to Japan or to the continent. Those are the two main discharge places.

THE COURT: I thought we went over this, Mr. Gilchrist.

MR. GILCHRIST: I do have a little left, your Honor. I do have one more point I have to get into the record.

THE COURT: All right.

Q You do recall having given an affidavit earlier in this same proceeding?

A I do.

Q Do you recall the circumstances of this affidavit?

A I believe that I was asked if I had ever had a charter party fall apart due to the wording of the drydocking clause.

THE COURT: You better identify this affidavit. First the date of it, please. Then is it part of the file papers and, if so, where is it in the file?

Q Is this the affidavit we are discussing, Mr. Gorrissen?

A Yes.

THE COURT: What date is it?

THE WITNESS: It is June 25, 1971.

THE COURT: What papers is it attached to?

MR. GILCHRIST: This was annexed to the motion on the petition to compel arbitration.

THE COURT: All right. Then we have it identified and since it is a file paper we don't have to mark it. I wanted it identified.

Q Did you go to the offices of Haight Gardner to execute this affidavit?

A I do not recall.

Q Do you recognize the notary's name, Mr. Gorrissen?

A Yes, I do. He is vice-president for the bank on the first floor of our building, the bank we use.

THE COURT: Of your building?

THE WITNESS: Yes.

THE COURT: You go down there?

THE WITNESS: Yes.

THE COURT: Then it was sent over to your office?

THE WITNESS: I presume so. I do not recall, but I know I go down to the bank there quite often to have him notarize things.

THE COURT: Your office is not in the same building as where the lawyers are?

THE WITNESS: No, sir, we are 1301 Sixth Avenue.

Q Did you prepare the affidavit yourself, if you recall?

A I don't recall.

Q You do agree that in this affidavit, Mr. Gorrissen, you stated, and I quote:

"In my experiences with charter parties certain terms must be considered major such as trading limits, cargo restrictions and of course the delivery date, redelivery date and the rates."

A That is right.

MR. GILCHRIST: I have no further questions of this witness, your Honor.

THE COURT: All right.

Any redirect of this witness?

MR. ESTABROOK: Thank you.

THE COURT: No redirect.

(Witness excused.)

THE COURT: Next witness.

MR. GILCHRIST: The respondents call Arthur Ferris.

A R T H U R E. F E R R I S, called as a witness in behalf of the respondents, after having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GILCHRIST:

MR. ESTABROOK: If your Honor please, we will concede Mr. Ferris is an experienced shipping man and thoroughly familiar with the New York chartering practices.

THE COURT: As far as his testimony as to the shipping industry and in particular the chartering of tankers, it is conceded; is that correct?

MR. ESTABROOK: Yes, sir.

THE COURT: All right.

Q Mr. Ferris are you familiar with the Mobil time form of charter party?

A Yes, I am.

Q And you have been sitting here throughout this trial, have you not?

A I have.

Q Have you read so-called fixture letter which has been accepted in evidence in this case, Mr. Ferris?

A Yes, sir, I have.

THE COURT: The two telex messages; is that what you mean?

THE WITNESS: The confirmation fixture sent by Mr. De Salvo to each of the parties.

Q More specifically, have you examined Petitioner's Exhibits 1, 2 and 3?

A I have seen 1 and 2 but I have never seen 3, although I understand it was testified to by Mr. De Salvo for his notes in connection with the fixture.

Q I want to show you also Respondents' Exhibit E. Have you previously examined this exhibit?

A Is this the first charter party that was sent on the 19th, approximately, and received in the National Shipping offices on Monday?

Q That is the testimony.

A Yes, I have seen this.

Q I direct your attention to the drydocking clause, Mr. Ferris, and I ask you if you have an opinion with respect thereto?

A Yes, I do.

Q Will you give us your opinion, please?

A My opinion is that this is a provision of substance and that there had to be an agreement between the parties on this matter in order for there to be a complete fixture.

Q What would the practical consequences for the parties trying to operate this vessel be of the terms of that provision as contained in the pro forma charter?

A Before I could answer that I would have to have this particular provision clarified. There is in this clause a question mark: Whose option is it to determine wnether the vessel would go to Portugal and Spain or the Iberian Peninsula, on the one hand, or Japan,on the other, and that would be a very important element, because if the owner determined that the vessel should go to the Iberian Peninsula or if the owner determined that it would go to Japan, then the charterer would be limited in his handling of that ship so that he would be in that position where he would live up to his guarantee of placing the vessel in that position.

Q Suppose it was the charterer's option, what would your answer be, then?

A To that extent he would be the one who would determine where the vessel would go, but he would be

restricted in his handling of that vessel for a period of several months before the drydocking date.

Q Why do you say several months, Mr. Ferris?

A The voyages for this vessel, as has been testified to by Mr. Gorrissen, would probably be between the Persian Gulf and the Continent. A voyage between the Persian Gulf and the Continent is approximately of 65 days duration, roughly 30 days each way, ballast and loaded, and roughly five days in port. It could be slightly less, it could be slightly more, but you would have to figure accordingly. Therefore a vessel to be available in the Continent, for example, in November to lift in the Persian Gulf sometime in the first half of October and in order to do this you would have to be scheduling the vessel on various limited voyages.

For example, you could not take that ship if she were on the Continent in early October and send her to the Persian Gulf because you would never get back to the Continent again in time for her to drydock in November.

Q Would you explain for the Court, Mr. Ferris, the relative importance or significance of the month of November as related to one year's trading of a vessel of this description?

A The winter period, generally speaking -- of course there have been exceptions when for one reason or another, generally, political circumstances have made

summer months strong -- but generally speaking because of the effect of the weather on the consumption of fuel, heating fuel, you generally get a greater move-out of cargos of oil from the storage terminals during the winter months requiring a greater amount of movement during the winter months to replenish that oil. The result is that there is greater demand during the winter months and the winter months are generally the stronger months.

In my own experience, for example, when I chartered any vessel for any period of a year or more I used to include a provision that the drydocking would take place during the summer months.

Q Would you say that it is fairly customary in the tanker trade for the charterer to desire to have his vessel free from any drydocking restrictions or limitations during the winter months?

A I would say that those charterers that I knew about, generally speaking, would desire this. Some were more adamant than others in their insistence on a suitable drydocking clause.

Q Do you consider this drydocking clause that we have seen in this proforma an essential provision of the charter?

A Do I consider this an essential provision?

Yes, I do. I consider it a provision that deals with substances; that affects the earning capacity of this vessel and that would have determined for me what I would pay for that ship. In other words, a ship without this limitation would be worth more to me than a ship with this limitation.

Q Can you elaborate on that a little, Mr. Ferris?

THE COURT: I don't see the relevance.

Let me ask you a question:

Have you seen this time charter with the Mobil provision before?

THE WITNESS: Oh, yes.

You are talking now about the printed provision.

THE COURT: Is there a custom in the trade and in the industry in the chartering of these vessels that the port at which the drydocking is to be carried out is always left to the selection of the charterer?

THE WITNESS: No.

THE COURT: Did you hear the testimony of Mr. Borrissen?

THE WITNESS: Yes.

THE COURT: You differ with him?

THE WITNESS: Oh, yes.

Q In what respects do you differ from what

Mr. Gorrissen has testified, Mr. Ferris?

A It is the owner of the vessel who drydocks the vessel and he determines where he is going to drydock his ship. He makes arrangements for the drydocking and drydocking arrangements are not simple.

THE COURT: Is it the custom of the industry and the trade to let that designation be made by the charterer after the proforma charter has been signed?

THE WITNESS: In the ordinary events where there is no addition to this printed language, the parties would agree on a time. The charterer would let the owner know that he can now drydock the ship and this, of course, would have been a matter of some prior discussion. The owner would have --

THE COURT: The time is specified here as a certain time in November. Is it the custom in a proforma charter signed after a fixture that the place would simply be left vacant as to the port of drydocking to be filled in at the charterer's suggestion after the proforma charter is signed?

THE WITNESS: I don't quite get this, your Honor. This particular language in this charter is not something that the two parties have agreed upon.

THE COURT: That is for me to decide, if they have

agreed upon paper it shall be November.

THE WITNESS: November and 15 days.

THE COURT: November and 15 days.

THE WITNESS: But there is an addition there and there cannot therefore be any agreement in connection with this.

THE COURT: What addition is there?

THE WITNESS: The addition is that the vessel shall drydock in either -- it is the intention of the owners to drydock the vessel in Portugal, Spain or Japan and charterer guarantees to place the vessel in position to drydock at any one of these countries. This is something that nobody agreed to and it is a very important point.

THE COURT: You mean there was no agreement as to the place of drydocking?

THE WITNESS: That is right.

THE COURT: Is it the custom in the trade to have the place of drydocking designated by the charterer?

THE WITNESS: No.

THE COURT: After the proforma charter is signed?

THE WITNESS: May I speak?

THE COURT: If you can answer that I would

appreciate it.

THE WITNESS: I am not sure I understand exactly the way in which to answer that question. The parties when they agree in accordance with the standard clause know that the vessel is going to have to drydock. In this case they knew that the vessel would have to drydock in November for 15 days.

THE COURT: Yes.

THE WITNESS: The custom would have been under those circumstances for the charterer and the owner to discuss sometime before November the probable place of drydocking for the charterer to give the owner an idea as to the intended trades so that they would know about where that vessel would be in November and for them then to make their arrangements for drydocking.

THE COURT: Is it the custom of the trade on a tanker coming from the Persian Gulf to be at the drydock in the Iberian Peninsula or in Japan?

THE WITNESS: No, no such custom.

THE COURT: Is there any other port that they ordinarily go to?

THE WITNESS: Yes, in this particular case I would have thought, if I were the charterer of this vessel that this vessel would have been drydocked in the United States.

Q Mr. Ferris, in the standard printed provisions of the Mobil time form what does it state on page 1 of the charter party with respect to drydocking?

A Clause 1C contains the owner's obligations on maintaining the vessel and has in it language that indicates that the vessel is fit for the carriage of crude oil and/or dirty petroleum products and being on delivery tight, staunch and strong after having been drydocked and painted at owner's expense, and that language is stricken out of this provision.

Q In the printed form now are there any blanks at clause 11 for the drydocking clause, any spaces left to be filled in by the parties?

A I don't see any.

Q Mr. Ferris, you were here for the testimony of Mr. Porvancher, were you not?

A I was.

Q And you heard him express his views on the

importance of insurance?

A Yes, I did.

Q Do you agree with Mr. Porvancher's testimony in that regard?

A Yes, I do.

THE COURT: with respect to what particular part of it? Direct his attention to a particular part. You can categorically ask him: Do you recall so and so testifying concerning a particular part of the testimony. Ask him whether or not he agrees with that statement and if so why.

Q You heard Mr. Porvancher comment on the deletion of clause 23?

A I did.

Q I ask you if you have any comment upon Mr. Porvancher's testimony in that respect?

A I agree with him that it is desirable that an owner have P & I coverage, so that wherever the ship may be if it gets into a difficulty it can be immediately released. But I still do not understand how that language of Clause 23 is deleted when there is nothing in the fixture memorandum referring to the deletion of Clause 23.

Q Do you consider the insurance provisions for a one-year time charter of a tanker of this description important terms of the charter party?

A They are important terms. Not the most important, but important.

Q And you heard Mr. Porvancher's testimony with respect to the matter of TOVALOP?

A I did.

Q Do you agree or disagree with that testimony?

A If this is a fixture subject details then there is no question that TOVALOP is a significant detail that the parties could properly discuss.

Q Let me ask you about this famous phrase, Mr. Ferris. Let us assume it is March of 1971 and you are negotiating with the broker and the phrase is given "Mobil time sub details." What would that mean to you?

A It would mean that the form of charter that we would use would be the Mobil time form and that we would have to work out the details.

Q What does the sub in sub details stand for?

A Subject to details.

Q Would you consider that if you had a so-called fixture sub details that you had a binding piece of business? If you were the charterer, for example, and the matter had been left that the fixture letter had been sent forward subject to details, would you consider as charterer that you could absolutely count on being able to have that vessel

because you had an enforceable agreement for her?

MR. ESTABROOK: I object to this. This is a question of law to be decided by the Court.

THE COURT: Sustained.

MR. GILCHRIST: I wish to take exception.

THE COURT: The law gives that to you.

Q Mr. Ferris, would you attempt to offer or trade a vessel that you had on sub details?

A No.

Q Why not?

A I wouldn't be sure I had it. It would be like selling stock I didn't own and not having the possibility of buying it later.

Q Is speed an important consideration in a charter of this nature?

A Yes, speed and consumption, both.

Q Would you be concerned if the tanker register showed a different consumption than that which was set forth in the alleged fixture letter?

A It would cause me to ask some questions. The tanker register is not necessarily accurate and I therefore would have to proceed from that to ask questions.

Q What sort of questions would you ask?

A Well, I would want to know more about the

consumption of the ship. I would want to know her speed light. I would want to know her speed loaded so that I could make an accurate projection of the probable break-even of that vessel on a world-scale basis.

Q And is one reason for taking an interest in the speed when you are dealing under the Mobil time form the provisions for reimbursement for under-performance?

A Yes.

Q And is the blank that comes in the Mobil form for the amount that you are reimbursed a matter of consequence to a charterer?

A Yes.

Q And if that amount has been filled in when the proforma is sent over to you and the figure put there, what would you like to know about that figure?

A I would make my own calculation and see whether or not I agreed with it. If I did, I would accept it.

If not, I would indicate that I did not agree with it.

Q And the reason for that, I take it, Mr. Ferris, is that that number there sets a ceiling on what you can recover for the under-performance as a charterer?

A That is correct.

MR. GILCHRIST: That completes my direct

examination of this witness, your Honor.

THE COURT: All right.

CROSS EXAMINATION

BY MR. ESTABROOK:

Q Mr. Ferris, do you know Mr. Germano of Bethlehem Steamship Services?

A I do and I have very pleasant recollections of my dealings with Bethlehem.

Q And Mr. Germano has been in court during this trial, hasn't he?

A Yes, he has been.

Q If this ship was to be drydocked in Lisbon would it not be entirely practical to have her come back from, say, channel ports UK, North Europe in ballast and divert into Lisbon for drydocking?

A Certainly, that would be what I would expect.

Q You are familiar with the Mobil time form?

A Yes, sir.

Q Doesn't Clause 12 provide that all insurance is to the account of the owner's?

A Yes, it does.

Q You are familiar with the fact that Bethlehem has a self-insurance policy, are you not?

A I have heard the testimony in the trial to that effect.

Q You have dealt with Bethlehem before, haven't you?

A It is not an item that has been in the forefront of my mind, I'm afraid. Maybe I heard of it. It may have been something that I remembered when I was active.

4/ Q Were you personally active in the market in 1971 or had you retired from Triton?

A I was active in the sense that I was a consultant at that time and maintained a consultancy relationship and knew something about what went on in the market, but I was not actively chartering at that time.

Q Bethlehem has had a good reputation for solvency over the years, has it not?

A Definitely.

Q Do you know of your own knowledge if Bethlehem ships have been seized for not paying on a P & I claim?

A I don't have that familiarity with Bethlehem's operations, but I have no doubt of Bethlehem's capability financially and operationally.

Q You are, I believe, familiar with the practice of brokering ships?

A You mean with how ships are chartered in the market?

Q Yes.

A Yes, of course.

Q Is it not the practice of an experienced broker to keep notes of his various telephone calls?

A I have never been a broker and I can't answer what proper practice would be.

Q You have been an owner's representative, have you not?

A Both owners and charterers, yes.

Q When you make an offer you customarily make notes, don't you?

A Yes, I do.

Q And sometimes you make an offer with a time for acceptance such as, say, 4:55 p.m. or something like that, do you not?

A Yes, sir.

Q When you make such an offer you write it down, don't you?

A No, I generally would give it to a broker and let him handle the writing. If you are talking, for example, of a single voyage, this is not done with written communications or Telex communications. It is done over the phone and you do not keep any notes of that nature.

Q But if you are dealing, say, with a 10-year

charter --

A Then you would be building up a record, yes.

Q And with a one-year charter you would keep notes, would you not?

A You'd keep some notes, yes.

Q When you receive a Telex, isn't it good practice to read it over carefully?

A Definitely.

Q And if you disagree to answer, is it not?

A I have been listening to the testimony and I understand that they did try to answer on the evening of the day that they received the fixture memo.

Q A Telex is a device that requires usually someone's typing ability to operate it, is it not?

A Yes.

Q Is it good practice when you get a message to acknowledge it, and, if you disagree with it, to state wherein you disagree?

A That would really depend on the circumstances. If, for example, it were I who was in the office at that time, I don't operate a Telex and if I had nobody to give it to and had tried unsuccessfully to communicate I would let it go 'til the next morning.

Q Then you would send a Telex the next morning,

wouldn't you?

A I would.

Q Dealing with the drydocking provisions, this phrase "drydocking November 15 days" is clear to you, is it not?

A Yes.

MR. ESTABROOK: Thank you, Mr. Ferris.

(Witness excused.)

MR. ESTABROOK: If your Honor please, that is petitioner's case. Mr. Germano is in the courtroom. I do not intend to call him as a witness.

MR. GILCHRIST: Before we close the record I would like to be certain that all the exhibits which should be in evidence are in evidence and I find that Exhibits F and K are still listed as for identification on them.

THE CLERK: F is not in evidence. K is in evidence.

MR. ESTABROOK: No objection. I suggest you just cross out the "id" on K.

MR. GILCHRIST: F is received in evidence, then?

THE CLERK: No objection?

MR. GILCHRIST: That is the letter of transmittal.

MR. ESTABROOK: No objection.

xxxx

(Defendant Respondents' Exhibit F received in evidence.)

MR. GILCHRIST: A, B and C, I believe, are still marked for identification.

THE CLERK: Yes, sir.

MR. ESTABROOK: My only objection is that they are not relevant, your Honor.

MR. GILCHRIST: Your Honor, they are certainly relevant to the extent that they were referred to in the testimony of Mr. Porvancher respecting TOVALOP and respecting Protection & Indemnity clubs.

THE COURT: I will take it. They don't have much to do with this case. The relevance is very narrow but we will take them. They will at least give me a little explanation of what TOVALOP is.

(Defendant Respondents' Exhibits A, B and C received in evidence.)

xxxx

MR. GILCHRIST: Your Honor, before we close the record I feel I must express a sense of concern over the state of the transcript.

THE COURT: I did look at the transcript. There were certain minor typographical errors in such portions as I got. I haven't seen the entire transcript. The only portion that I have seen are a few pages concerning

the testimony of Harry Theodoracopulos on direct examination. I read it over.

First, I think you should rest now.

MR. GILCHRIST: I cannot rest, your Honor, without--may I point out my concern about the transcript? Mr. Cohen has told me that he is going to check his notes but as the transcript now stands it seems to me that at least a page or thereabouts of colloquy between your Honor and myself when you ruled during the course of my examination of Mr. DeSalvo has been dropped.

THE COURT: I don't know. I haven't seen that. How is it important here?

MR. GILCHRIST: That was a ruling that your Honor made confining my cross examination of Mr. DeSalvo and we had an exchange of several sentences and I would not like to rest without leaving some avenue open if Mr. Cohen does not find that to make some form of application to the Court.

THE COURT: Suppose you do it and we'll take it. You go over the minutes. I haven't received the minutes yet. What I was going to suggest is this: If you go over the minutes and there are any corrections that you feel should be made, that is, by either one of you gentlemen, propose them on paper -- I don't like letters -- saying that

you wish to amend the transcript in the following respects and give the line number and page that you object to. Perhaps counsel can agree. It may be a simple typographical error oft times. Our reporters are working under tremendous pressure these days when they are shorthanded and overworked and can't get typists to help them. Some of the reporters have told me that they have been here trying to get transcripts out until 2 or 3 o'clock in the morning. They take them home also and work over the weekends, Saturday and Sunday at home.

What I suggest you do is this: Get your transcripts first. I haven't gotten mine. I assume somebody ordered a copy for me. I was told I would get it. I made a ruling at the beginning of the trial and ruled that it was a taxable disbursement, taxable to the successful party. Each of you are to pay one-half. Am I correct?

MR. GILCHRIST: That is correct.

THE COURT: If there is anything in the transcript in any respect which you wish to change file a motion and my law clerk will give you a day to come in on it. I thought today we could arrange to set the schedule now for final submission of this case.

Suppose you do it this way: You rest now subject to any application you might make after you have reviewed

the transcript.

MR. GILCHRIST: I do.

THE COURT: If it raises any question that you feel you desire to call Mr. DeSalvo on, he is available as a witness. He is right here and available.

MR. ESTABROOK: He is in New York, yes.

THE COURT: So it isn't a major problem.

With that ruling do you now rest?

MR. GILCHRIST: Yes.

THE COURT: Do you rest?

MR. ESTABROOK: Yes, your Honor.

THE COURT: Today is the 2nd of May. I would like to get the proposed findings from each one of you and your final, closing briefs. I think you are to get them in here in the next four weeks, by the end of May, don't you?

MR. ESTABROOK: Yes.

THE COURT: Suppose we do this. Suppose that we have any motions made with respect to the transcript within 10 days or one week. Is that enough time?

MR. GILCHRIST: 10 days would be fine, your Honor.

THE COURT: That disposes of that problem and you can start in getting your findings up in

final shape. Motions, if any, by either party to correct the transcript is to be made by May 11.

Is that all right?

MR. GILCHRIST: Yes.

THE COURT: If no motion is made the transcript is deemed to be accurate.

MR. ESTABROOK: Yes.

THE COURT: What do you say, Mr. Gilchrist? I didn't hear you.

MR. GILCHRIST: I concur, your Honor.

THE COURT: It would seem to me, then, that I ought to get the proposed findings and memo by the end of May.

MR. GILCHRIST: May 31, your Honor?

THE COURT: All right, May 30. Findings should only be a statement of facts. They should not be phrased on argumentative form.

MR. GILCHRIST: I know what a finding is, your Honor.

THE COURT: I know you do. I am not trying to give you instructions, but some lawyers word findings in such a way as to contain an argument.

MR. GILCHRIST: Your Honor, my arguments will be

in my brief.

THE COURT: We hope so.

MR. GILCHRIST: If a finding cannot be supported from an exhibit or from a page in the transcript it won't be proposed.

THE COURT: That is fine.

If you recall, at the beginning of the trial we made some attempt to state the very narrow issues that this trial presents in the opinion of the Court of Appeals after finding whether or not the exchange of these Telexes constituted a contract period.

MR. GILCHRIST: We have that in the record, your Honor.

THE COURT: It is somewhere in the record. That is the issue.

MR. GILCHRIST: That is the issue, two issues, your Honor.

THE COURT: That is right, but we both agree on the issues.

MR. GILCHRIST: That is correct.

THE COURT: Don't give me a lot of citations about something which I knew and I might have forgotten, but I doubt whether I have.

I don't know if I may need argument but if I

determine that I need a little argument on certain points I will call you on it.

No reason in making summations now. If there is something that is bothering me and I would like some further information I will call you up and I will give you a short hearing and I promise to make it convenient to you.

MR. GILCHRIST: Thank you, your Honor.

MR. ESTABROOK: Thank you, your Honor.

THE COURT: Thank you for your courtesy and thank you for your kindness.

MR. GILCHRIST: Thank you for your kindnesses and your patience, your Honor.

THE COURT: All right, gentlemen.

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